



2008

## Guilty Pleas or Trials: Which Does the Barrister Prefer?

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32 Melb. U. L. Rev. 242-274 (2008)

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# GUILTY PLEAS OR TRIALS: WHICH DOES THE BARRISTER PREFER?

PETER W TAGUE\*

*[Barristers in England and attorneys in the United States have been upbraided for pursuing their interests to their clients' detriment in recommending guilty pleas over trials. While this accusation against American attorneys could be true since their incentives are sometimes skewed to favour guilty pleas, it is not accurate with respect to barristers in England. This is because the latter's selfish incentives — to maximise income and avoid sanction — incline them to prefer trials over guilty pleas. In Melbourne and Sydney, barristers have never been similarly accused. Indeed, the topic has not been studied. Based on interviews with legal professionals in those cities, this article concludes that, as in England, barristers' incentives lead them to prefer trials. Thus, when barristers in Melbourne or Sydney recommend a guilty plea, they are arguably thinking of the defendant's interest rather than their own.]*

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## I INTRODUCTION

Many criminal defendants plead guilty at or shortly before trial. Their reasons vary. A defendant, for example, may have exhausted the resources that they can expend to fight the charge(s). Another, awash with remorse, might finally admit culpability. A third might buckle from the tension while awaiting the case's resolution. Another might learn that a witness previously expected not to testify against them will do so. A fifth, despite having adamantly insisted upon a trial, might plead guilty on the strong advice of their legal advocate.<sup>1</sup> It is this last defendant, and their legal advocate, who are the subjects of this article.

What led the advocate to persuade the fifth defendant to change their plea to guilty? Were the advocate's motives paternalistic in that the defendant had to be convinced that a jury would surely convict, with the repercussion of a much

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<sup>1</sup> I am concerned with advocates in Australia and England ('barristers') and the United States ('attorneys') who represent criminal defendants at trial (in the superior courts) and, who along with the solicitor in the first two countries, advise the defendant on their choice of plea.

harsher sentence than that which would follow a guilty plea?<sup>2</sup> Or was the advocate covertly advancing their own personal interests without regard to the defendant's?

Overlooking that first motive, bewildered defendants and incensed critics have accused barristers in England's Crown Court and attorneys in the United States of manipulating defendants into pleading guilty in order to satisfy advocates' own interests, even at their clients' expense.<sup>3</sup> If this accusation were true, advocates would be betraying their clients, and plea negotiations would be a sham given that the advocate would be acting as the prosecutor's covert ally rather than as the defendant's protector.

While this accusation is false when aimed at barristers in England,<sup>4</sup> it could be accurate when applied to attorneys in certain jurisdictions in the US who are chosen to represent defendants in publicly-funded cases.<sup>5</sup> As no advocate would admit to sacrificing their client to pursue their own interests, the question is one which can only be approached by examining the advocate's incentives. If the advocate thought only of themselves, would they prefer a guilty plea or a trial? In England's Crown Court and in some but not all jurisdictions in the US, advocates' incentives incline them to prefer a trial. It follows, arguably, that when a barrister in England recommends a guilty plea, the barrister must believe that that plea is the better choice for the defendant since it is not personally the more advantageous choice. In recommending a guilty plea, then, the barrister properly subordinates their interests to those of the client.

<sup>2</sup> Due to the vastly higher penalty often imposed in the US when the defendant is convicted by a jury as opposed to pleading guilty, attorneys may be motivated by paternalism more than barristers or solicitors in England and Australia. Many attorneys have had experience representing a defendant charged with multiple offences. I once represented a defendant charged with kidnapping, raping, robbing and stealing from three women in separate events. The prosecutor in that case offered to let the defendant plead guilty to one count with respect to each victim provided that he was imprisoned. The obvious choice was theft because it carried the lowest minimum and maximum punishments. Upset that he might be jailed for two to three years (my prediction), the defendant refused to admit guilt. Convicted of all charges at trial, he was sentenced to three consecutive life terms. Barristers in Australia and England were aghast when told of this defendant's story because the prosecutor's offer could have lured an innocent defendant to plead guilty, and the plea did not necessarily represent the defendant's culpability. In neither country had they heard of such a generous (or an egregious) offer.

<sup>3</sup> For criticism of barristers, see Michael McConville et al, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (1994) 256–61, which describes how counsel determined to obtain a guilty plea 'manipulated' defendants to that end. The authors observed barristers counselling criminal defendants while studying the performance of defence solicitors in criminal cases. They never spoke with the barristers to learn their reasons for recommending guilty pleas, or assessed whether a trial might have led to a better result than a guilty plea. Without this information, the authors failed to recognise that the barristers' motives might have been paternalistic. For more criticism of barristers, see John Baldwin and Michael McConville, *Negotiated Justice: Pressures to Plead Guilty* (1977) 46, where defendants accused their barristers of offering 'no alternative but to plead guilty' and of having 'instructed', 'ordered' or 'forced' them to do so. For criticism of attorneys, see Abraham S Blumberg, 'The Practice of Law as Confidence Game: Organizational Cooptation of a Profession' (1967) 1 *Law and Society Review* 15.

<sup>4</sup> See Peter W Tague, 'Barristers' Selfish Incentives in Counselling Defendants over the Choice of Plea' [2007] *Criminal Law Review* 3.

<sup>5</sup> See Peter W Tague, 'Guilty Pleas and Barristers' Incentives: Lessons from England' (2007) 20 *Georgetown Journal of Legal Ethics* 287, 304. The temptation to pursue personal interests is less for attorneys paid by the criminal defendant and for salaried public defenders than it is for attorneys appointed to represent criminal defendants: at 292–3.

Intriguingly, barristers in Melbourne and Sydney have escaped the criticism levelled at their counterparts in England and the US. In conversations with judges, barristers, solicitors, academics and others in those two cities,<sup>6</sup> no-one accused them of covertly soliciting guilty pleas to further their own ends. In the literature there is little more than a hint that barristers might be suspected of pursuing their interests when recommending guilty pleas.<sup>7</sup> Why in Australia is this issue so exotic that it has never been studied? Are barristers in Melbourne and Sydney more virtuous than advocates in the other two countries? Or, as in England's Crown Court, does the structure of practice align barristers' interests closely with those of defendants?

The advocate's two selfish interests that are constant are to maximise remuneration and to avoid sanction.<sup>8</sup> Although practice arrangements differ somewhat between Melbourne and Sydney, if barristers in those two cities were to pursue those two selfish goals, the structure of their practice disposes them to prefer trials no less than their counterparts in the Crown Court,<sup>9</sup> and that preference is arguably the strongest in Melbourne.<sup>10</sup>

<sup>6</sup> In Melbourne, I interviewed 13 barristers and 11 solicitors (four of whom were employed by Victoria Legal Aid ('VLA')); in Sydney, I interviewed 11 barristers and nine solicitors (four of whom worked for Legal Aid NSW). In addition, I spoke with two Supreme Court judges (one in each city), a District Court judge in Sydney, three clerks of barristers' chambers (two in Melbourne, one in Sydney), three Crown Prosecutors in Melbourne and four in Sydney, three amalgams (solicitor-advocates), and various academics. While I did not promise anonymity, I have decided in the main not to name those who so generously tried to educate me about criminal defence practice in the two cities as certain interviewees did ask that parts of our discussion be off-the-record.

<sup>7</sup> See Robert D Seifman and Arie Freiberg, 'Plea Bargaining in Victoria: The Role of Counsel' (2001) 25 *Criminal Law Journal* 64, 72, noting, but leaving undeveloped, the point that barristers might prefer to resolve cases by guilty pleas. In considering how defendants might be induced to plead guilty earlier in the proceedings, two recent Australian reports have indicated that barristers might structure their advice regarding the defendant's plea in light of the differences in compensation for guilty pleas as compared with trials: see Sentencing Advisory Council, *Sentence Indication and Specified Sentence Discounts: Final Report* (2007) 21–2; Jason Payne, *Criminal Trial Delays in Australia: Trial Listing Outcomes* (2007) 26–7. Neither report analysed the barrister's incentives. However, the Sentencing Advisory Council rejected financial self-interest as a motive among Victorian barristers. Others reject as applicable to Australian barristers a famous thesis offered to explain why attorneys in the US coerce guilty pleas from defendants — attorneys do so, the thesis explains, to please other professionals (such as the prosecutor and the judge) or to avoid being punished by them: see Kathy Mack and Sharyn Roach Anleu, *Pleading Guilty: Issues and Practices* (1995) 114–15. For various reasons, this thesis is also largely inaccurate as a description of attorneys' incentives and has no purchase when applied to barristers in England's Crown Court: see Tague, 'Guilty Pleas and Barristers' Incentives', above n 5, 293–4.

<sup>8</sup> One referee contended that barristers' personal reasons dominate these two systemic ones. I accept that a barrister might prefer a guilty plea in order to obtain time to recover from an exhausting trial, to address an unexpected family matter, or to satisfy the spontaneous desire for a short vacation. However, neither the structure of practice nor the compensatory scheme can be changed to address those non-systemic reasons. The barrister's two incentives mentioned in the text, on the other hand, can be addressed by such changes.

<sup>9</sup> By 'structure of practice' I mean to include the barrister's education, culture, incentives (remuneration and avoiding sanction) and involvement with instructing solicitors and defendants. In Melbourne in particular, barristers' relationships with their two clients (the solicitor and defendant) are different from the same relationships barristers in England's Crown Court have with their clients: see below Part III(B).

<sup>10</sup> For example, barristers in Melbourne risk being sanctioned by the instructing solicitor (more so than their counterparts in Sydney) if they wait until near the commencement of the trial to recommend a guilty plea: see below n 118 and accompanying text.

This article is arranged as follows. Part II illustrates how the structure of practice in the US and in England's Crown Court could induce advocates to prefer guilty pleas over trials. The discussion then turns to the incentives of barristers. (American attorneys are not included in this discussion because the salient parts of practice that generate their incentives are quite different from the structure of practice for English and Australian barristers.) Parts III and IV analyse those two selfish interests of barristers in the Australian cities, with particular emphasis upon practice in Melbourne.<sup>11</sup> Part V addresses the inverse problem: as barristers benefit more from trials than guilty pleas, might they refrain from advising defendants to plead guilty when the expected value of such a plea exceeds that of a trial?

## II TEMPTATIONS

Advocates should be trusted to subordinate their interests to those of the criminal defendant. However, if an advocate did pursue their own self-interest without regard to the defendant's interests, how would they calculate the personal benefits of a guilty plea or a trial? If the advocate benefited from one plea and the defendant from the other, could the advocate disguise their quest to advance self-interest at the defendant's expense? In this Part, we consider the temptations for attorneys in the US and barristers in England's Crown Court to prefer guilty pleas over trials. According to critics, this is a preference advocates cannot resist.<sup>12</sup> Interestingly, critics have failed to recognise that barristers might be tempted to prefer a trial when a guilty plea is actually the defendant's better choice. It is this second temptation that is more likely to seduce barristers in Melbourne and Sydney.<sup>13</sup>

In publicly-funded cases in the US, selection and compensation tempt attorneys to prefer guilty pleas. Unlike barristers in England and Australia, American attorneys are not chosen to represent indigent defendants by an intermediary (the solicitor) who also represents the defendant and has an interest in selecting an able, loyal advocate. Instead, in those jurisdictions where judges or court officials select the attorney, attorneys may fear being denied appointments in the future if they do not deliver a guilty plea in a case the judge thinks should be ended in that way.<sup>14</sup>

Similarly, compensatory schemes in publicly-funded cases create an incentive for attorneys to end cases by guilty plea. Attorneys with a contract to represent a certain percentage of the jurisdiction's indigent defendants for a bulk fee, for example, maximise their monetary yield per case by avoiding trials and ending

<sup>11</sup> Sydney is in the midst of a pilot project that seeks to induce defendants to plead guilty in the Local Court rather than wait until the date of their trials in the District Court. In order to achieve that goal, the incentives of solicitors have been changed in the hope that they will candidly discuss guilty pleas with defendants in the Local Court rather than defer to barristers' advice in the District Court. While the pilot project does not seem to have altered the Sydney barrister's preference for a trial, I thought that it was wiser to concentrate on Melbourne barristers.

<sup>12</sup> See above n 3.

<sup>13</sup> This will be discussed further below in Part V.

<sup>14</sup> See Peter W Tague, 'An Indigent's Right to the Attorney of His Choice' (1974) 27 *Stanford Law Review* 73, 81 fn 50, 82 fn 52.

cases by guilty pleas.<sup>15</sup> Jurisdictions that instead pay an hourly rate typically cap the overall amount the attorney can earn.<sup>16</sup> As their effort approaches that ceiling, attorneys are tempted to end the case by guilty plea to avoid piercing the cap (and earning nothing more).<sup>17</sup>

In comparison, self-interested behaviour by barristers in England's Crown Court might be found in the 'cracked trial', 'double-booking' and the 'returned brief', which are facilitated by the complexity of the compensatory scheme in publicly-funded cases. The term 'cracked trial' refers to a case scheduled for trial that ends on that day.<sup>18</sup> Of the reasons for a cracked trial, the most prominent is the defendant's belated guilty plea — this was the reason in 81 per cent of cracked trials in the Crown Court in London,<sup>19</sup> in 15 per cent of cracked trials in the County Court of Victoria<sup>20</sup> and in 44 per cent of cracked trials in the District Court of New South Wales.<sup>21</sup> Cracked trials are reviled for wasting expensive preparation by judges, and by the prosecution and defence, as well as for inconveniencing witnesses.<sup>22</sup> Studies canvassing the many reasons defendants plead guilty at the last moment never accuse the barrister of being the nefarious cause.<sup>23</sup> Might a selfish pursuit of a barrister's interests nonetheless precipitate these guilty pleas?

'Double-booking' and the brief that is 'returned' (or 'flicked' in the Australian argot) work hand in glove. They are no less troubling than the cracked trial and may contribute to late guilty pleas. A barrister 'double-books' by accepting the defence of defendants charged separately but on the same or overlapping days. This ensures that the barrister has remunerative work. If one trial begins, the barrister must 'return' the brief of the other to the instructing solicitor for that

<sup>15</sup> See Tague, 'Guilty Pleas and Barristers' Incentives', above n 5, 304.

<sup>16</sup> In the State of Maryland, for example, attorneys representing indigent defendants are paid \$90 per hour up to a maximum amount of \$5200: *ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> Australians do not use this term as shorthand for a late guilty plea, but since they seem not to have a substitute — one interviewee could think of no better expression than a 'matter resolved into a plea' — I will use this pithy way of describing the phenomenon.

<sup>19</sup> See Department for Constitutional Affairs, United Kingdom, *Judicial Statistics 2005 (Revised)* (2006) 88. In 2005, 80.7 per cent of 'cracked' trials in the Crown Court were caused by the defendant's guilty plea, either to all charges (62.5 per cent) or to fewer or lesser charges accepted by the prosecution (18.2 per cent). The other reasons why trials cracked in 2005 included the prosecution's decision to offer no evidence (16.8 per cent), the defendant's acceptance of a bind over (when the defendant's promise of good behaviour suspends the case) (2.3 per cent) or the defendant's death or unfitness to plead (0.2 per cent). There are no published figures for the number of cases ended by guilty plea after the case is listed for trial but before the trial date: Email from Kevin Dibdin (Ministry of Justice, United Kingdom) to Peter Tague, 7 September 2007.

<sup>20</sup> Of cases ended by guilty plea in the County Court of Victoria in 2005–06, 15 per cent occurred at the 'door of court,' two per cent during trial and seven per cent 'after directions': Sentencing Advisory Council, *Sentence Indication and Specified Sentence Discounts: Discussion Paper* (2007) 8.

<sup>21</sup> A 2006 study reported that 65 per cent of those cases listed for trial in the District Court of New South Wales did not proceed, and in 44 per cent of those cases the reason was the defendant's guilty plea: Payne, above n 7, 21.

<sup>22</sup> See United Kingdom, Royal Commission on Criminal Justice, *Report* (1993) 111. Changes in England to induce defendants to plead guilty earlier (including sentencing discounts and defence disclosure) are designed, according to legal professionals with whom I have spoken, to reduce the number of cracked trials.

<sup>23</sup> See, eg, Payne, above n 7, 25.

defendant. By returning the second brief, the barrister upends the value of the estimable cab rank rule, which (with certain exceptions) requires barristers to accept any brief no matter how odious the crime, the defendant or the defence.<sup>24</sup> In many cases, however, the barrister in England's Crown Court reneges on this obligation and returns the defendant's brief to the instructing solicitor because the solicitor must then find a substitute.<sup>25</sup> The results are twofold: first, the barrister who juggles two briefs may not be properly prepared to defend in the trial of the brief kept; and, secondly, one of the two defendants is denied the help of a barrister who that defendant may have come to trust.<sup>26</sup>

In order to recognise how the cracked trial, double-booking and the returned brief might fit a self-interested barrister's agenda to pursue guilty pleas, the way in which barristers are compensated in publicly-funded cases must be understood. In England's Crown Court, the elaborate fee structure can create a preference for guilty pleas. The 'basic fee'<sup>27</sup> under what was formerly the Graduated Fee Scheme ('GFS') includes the case's preparation and the first day of trial.<sup>28</sup> That fee varies with two factors: (i) how and when the case ends; and (ii) the seriousness of the charges.<sup>29</sup> Of the ways to end the case, a guilty plea earns the least, with a higher but identical fee paid for a trial and a cracked trial.<sup>30</sup> Every serious crime is then placed in one of nine categories, with different

<sup>24</sup> See The NSW Bar Association, *The New South Wales Barristers' Rules* (2001) r 85; The Victorian Bar Inc, *Practice Rules* (2005) r 86; Bar Standards Board, *Code of Conduct* (8<sup>th</sup> ed, 2004) s 1 [601–2].

<sup>25</sup> According to the most recent study, 48 per cent of defence briefs were returned: see Michael Zander and Paul Henderson, *Crown Court Study* (1993) 54. Barristers, solicitors and officials in the UK's Ministry of Justice have told me that they estimate this number still remains around 50 per cent.

<sup>26</sup> For other corrosive consequences of the returned brief, see Peter W Tague, *Effective Advocacy for the Criminal Defendant: The Barrister vs the Lawyer* (1996) 128–36.

<sup>27</sup> The 'basic fee' in the Crown Court is called a 'brief fee' in Victoria and NSW.

<sup>28</sup> Under the GFS, barristers in the Crown Court were paid separately for conferences with the defendant and expert witnesses, and for views. See *The Criminal Defence Service (Funding) Order 2001* (UK) sch 4 [19] as amended by *The Criminal Defence Service (Funding) (Amendment) Order 2005* (UK) [15]. The GFS was replaced in 2007 by the Advocates' Graduated Fee Scheme ('AGFS'): see *The Criminal Defence Service (Funding) Order 2007* (UK). The AGFS may alter barristers' incentives and incline them to prefer cracked trials over trials, by rolling separate fees for the trial's second day and for visiting the scene and conferring with the defendant into the basic fee received, whether the trial cracks or proceeds to verdict. As the AGFS's effect on barristers' incentives is not yet clear, I will use the GFS in the text to demonstrate how the barrister's incentives might be channelled by fees.

<sup>29</sup> See *The Criminal Defence Service (Funding) Order 2001* (UK) sch 4 [8], sch 4 [10] as amended by *The Criminal Defence Service (Funding) (Amendment) Order 2005* (UK) [9], [11(a)].

<sup>30</sup> See *The Criminal Defence Service (Funding) Order 2001* (UK) sch 4 [8], sch 4 [10] as amended by *The Criminal Defence Service (Funding) (Amendment) Order 2005* (UK) [9], [11(a)]. Before 2005, the fee for a cracked trial exceeded that for a trial, thus clearly fostering an incentive for guilty pleas: see Tague, 'Guilty Pleas and Barristers' Incentives', above n 5, 305 fn 95 and accompanying text; *The Criminal Defence Service (Funding) Order 2001* (UK) sch 4 [8], sch 4 [10].

basic fees for different categories.<sup>31</sup> Finally, barristers rarely earn anything for preparing a brief that they later return.<sup>32</sup>

With this information, barristers can determine precisely how much they can earn depending upon a case's resolution. Consider how temptation arises. Finishing a case on a Friday, a barrister plans to use Monday and Tuesday to prepare for a trial of a serious crime with a high basic fee that is set to begin on Wednesday. Late on Friday, the barrister learns that a different solicitor wants to brief them for a two-day trial starting on Monday with a lower basic fee than Wednesday's. Does the barrister accept? Monday's brief will provide an unexpected boost in the barrister's earnings, but if Monday's trial were to leak into Wednesday — and the barrister is keenly aware that trial estimates are unreliable — the barrister must return Wednesday's brief. The obvious solution of rescheduling one of the cases is rarely available.<sup>33</sup>

When one trial is not postponed, the barrister knows that if Monday's case does not end as predicted, they will lose the higher basic fee for Wednesday's case and also risk jeopardising their relationship with that solicitor (who must scramble to find another barrister).<sup>34</sup> Cracking Monday's trial, by contrast, carries only a minor risk of irritating the solicitor. If Monday's defendant was unhappy about pleading guilty, the solicitor would find a way to placate them because this solicitor, to avoid searching over the weekend for a replacement, needs the barrister more than a trial. In this setting the barrister, thinking selfishly, knows to take Monday's brief and encourage that defendant to plead guilty, thereby pocketing a cracked trial fee without losing Wednesday's fee.<sup>35</sup>

Do attorneys in the US and barristers in the Crown Court succumb to their different temptations to extract guilty pleas from reluctant defendants? They

<sup>31</sup> See *The Criminal Defence Service (Funding) Order 2001* (UK) sch 4 [8], sch 4 [10] as amended by *The Criminal Defence Service (Funding) (Amendment) Order 2005* (UK) [9], [11(a)]. For the table of offences indicating each category, see *The Criminal Defence Service (Funding) Order 2001* (UK) sch 4 (Table of Offences).

<sup>32</sup> Among the conditions for receiving compensation (a 'wasted preparation fee'), the barrister must have reasonably expended more than eight hours in preparation, and the case must have either ended by a cracked trial with more than 150 pages of evidence or by a trial lasting longer than five days: see *The Criminal Defence Service (Funding) Order 2001* (UK) sch 4 [18].

<sup>33</sup> According to interviewees in all three jurisdictions, judges do not favour this solution if the purpose is to accommodate a barrister with a scheduling conflict. If Wednesday's brief must be returned, judges treat barristers as if they were fungible, as good as each other, and all able to prepare a newly acquired brief very quickly. Rescheduling one of the cases is much less attractive to barristers in England's Crown Court than to barristers in the two Australian jurisdictions. Barristers in Melbourne and Sydney keep the brief, but barristers in the Crown Court return it to the solicitor, making it easier for the solicitor to select the barrister they truly want for the rescheduled date. Without the promise of retaining the brief, the barrister in the Crown Court is likely to receive no more than a miserly fee for the court appearance during which the case was rescheduled: see Tague, 'Barristers' Selfish Incentives in Counselling Defendants over the Choice of Plea', above n 4, 21. By contrast, the barrister in Victoria receives a \$845 fee when the case is adjourned, even if the defence is at fault for causing the adjournment: Email from Bill Trumble (VLA Cost Adviser) to Peter Tague, 23 September 2007.

<sup>34</sup> A solicitor who was upset with the service provided by this barrister could retaliate by refusing to brief them in the future. See further below nn 111–16 and accompanying text.

<sup>35</sup> The analysis is the same if the briefs are reversed: suppose the barrister has Monday's brief when offered Wednesday's. By taking Wednesday's the barrister wants to induce Monday's defendant to plead guilty.



adamantly deny the accusation,<sup>36</sup> but would one expect otherwise? No advocate would admit subordinating their defendant's interests in order to further their own.

The truthfulness of the barristers' denial is supported by the structure of practice in the Crown Court. In England, barristers' two overarching incentives of maximising remuneration and avoiding sanction incline them to prefer trials over guilty pleas.<sup>37</sup> Similarly, in Melbourne and Sydney those two incentives create an even stronger preference for trials over guilty pleas, even though trials crack, briefs are rarely returned, double-booking is said to occur less often, and the compensatory schemes are much simpler than England's GFS.

The next Part examines the first of the barrister's two incentives in representing defendants — maximising income — chiefly in the context of practice in Melbourne. Part IV addresses the other incentive, that of avoiding sanctions.

### III MAXIMISING COMPENSATION

In order to examine whether the incentive of maximising remuneration inclines barristers in Melbourne and Sydney to prefer trials, we will consider several factors. This Part begins by asking how fledgling barristers acquire work. Answering that question involves becoming familiar with the path to becoming a barrister. The discussion then shifts to what solicitors expect from barristers and the sort of reputation barristers want to develop — do they strive to become known as advocates, negotiators or as something else? The fees paid to barristers by defendants and by legal aid are then examined — does compensation favour trials or guilty pleas? Although those three topics suggest that barristers prefer trials, there remains the nagging concern about cracked trials. Consequently, we will also consider this question: if the barrister prefers trials, why does the barrister recommend that the defendant wait to plead guilty on the day of trial?

#### *A Obtaining Briefs*

At the inception of their careers, barristers in England obtain work in a different way from their counterparts in Melbourne and Sydney. This difference can be traced to the barrister's route to the Bar. While barristers in both countries undergo similar preparatory steps to become a barrister (with respect to education and pupillage), in England one chooses at the outset to become either a barrister or a solicitor. This rigid distinction between the two forms of work does not exist in Australia, where every barrister is not only a solicitor but almost invariably practised as one, often for many years, before switching to the Bar.<sup>38</sup>

<sup>36</sup> I have been told this in conversations with many barristers and attorneys.

<sup>37</sup> See Tague, 'Barristers' Selfish Incentives in Counselling Defendants over the Choice of Plea', above n 4.

<sup>38</sup> A barristers' clerk in Melbourne who had over 100 barristers in his chambers estimated that 99 per cent of them had practised first as a solicitor. In Sydney, a barrister of three years' call said that he was the second youngest enrollee when, at the age of 27, he began the Bar Reading Programme. His four years of practice as a solicitor were, he thought, several fewer than the norm. Moreover, all the criminal solicitors I interviewed were able to name former associates who are now practising as barristers.

However, despite this difference, the manner in which barristers in both countries obtain work fuels a preference for trials.

Practising first as a solicitor has two salutary ramifications for new barristers in Melbourne and Sydney. First, barristers know what solicitors expect of them because the barrister was once a solicitor. Secondly, new barristers in the Australian cities do not depend upon the barristers' clerk to find work for them.<sup>39</sup> They do not leave the safety of a salary and benefits as an employed associate unless they are confident of receiving briefs from their former firm.<sup>40</sup> They also expect to receive briefs from other solicitors who know their work as advocates, since the new barrister would have defended clients as a solicitor in the Magistrates' or Local Court and possibly even in the County or District Court.<sup>41</sup>

In England, by contrast, few new barristers will have the same contacts and must therefore rely on the barristers' clerk for work. In a successful criminal chambers, the clerk will have much to distribute, including briefs returned by other barristers in the chambers and briefs received from solicitors who authorise the clerk to choose the barrister. When not known by solicitors, new barristers are in a perilous position if the clerk is not pleased by their efforts, for they risk being denied briefs by their only source. The goal of new barristers, then, is to free themselves from relying on the clerk. In order to have briefs sent to them by solicitors, barristers must become known for their prowess as litigators, and to do this barristers need trials.<sup>42</sup>

New barristers in Melbourne and Sydney would have already attained a respectable reputation for advocacy, one developed while litigating as solicitors.<sup>43</sup> Nonetheless, new barristers in Melbourne and Sydney have an important reason to try cases and to excel at doing so. Solicitors test how new barristers will behave by briefing them in legal aid cases. Solicitors do not want to risk upsetting a client who pays their and the barrister's fees until they are satisfied that the barrister will perform as they demand and as the client expects. In order to

<sup>39</sup> While solicitors usually contact the barrister directly (unlike England, where solicitors must work through the barristers' clerk), they sometimes ask a barristers' clerk to list the barristers available. In providing this list, a clerk might hamper a barrister's career by not naming a barrister about whose performance another solicitor has complained.

<sup>40</sup> To illustrate, to aid the career of an experienced associate who was not made partner, the firm's name partner encouraged him to become a barrister by promising to provide him with briefs.

<sup>41</sup> Solicitors advocate in contested committals on behalf of defendants whose cases are bound for the County Court of Victoria. There are very few contested committals in NSW. In both jurisdictions, solicitors sometimes appear in the superior courts on behalf of defendants as they plead guilty or are sentenced. Although there seems to be no published study of advocacy by barristers in England's magistrates' courts, barristers' clerks have told me that this source of work is disappearing because solicitors are performing it, with the result that new barristers in England lack a venue to learn advocacy skills where their mistakes will not be extremely costly to defendants (the defendants in the magistrates' court are charged with less serious offences).

<sup>42</sup> Unlike their counterparts in Melbourne and Sydney, new barristers in England will also have virtually no advocacy experience upon becoming a barrister. They may have participated in a few moots during the one-year training between university and pupillage (the Bar Vocational Course), and they will appear in court during the second six months of their pupillage if the barristers' clerk finds work for them. However, very few chambers have formal (let alone rigorous) advocacy training for their pupils.

<sup>43</sup> While advocating as a solicitor, new barristers learn the mechanics of practice and become comfortable on their feet, trying to persuade others on behalf of a client. They also have the invaluable opportunity to observe other advocates, both solicitors and barristers.

graduate to better paying work, barristers must become competent advocates and provide the sort of service that solicitors want. Consequently, while new Australian barristers may obtain work in a different manner from their English counterparts, both ways result in a preference for trials.

### *B Solicitors' Expectations about Barristers' Performance*

Solicitors in Melbourne expect the barristers they brief to have a different relationship with them (and with the defendant) than solicitors expect of barristers in England. The barrister in England's Crown Court is comparatively detached from the defendant and their defence. The trial is the first contested proceeding in the prosecution. Administrative hearings occur after the case graduates from the magistrates' court to the Crown Court, but the barrister briefed for trial will not always appear at them. An inexperienced barrister will often carry various briefs held by more senior barristers in their chambers to these proceedings to announce the defendant's plea, settle evidentiary matters and list the case for trial if the defendant pleads not guilty.<sup>44</sup> In publicly-funded cases, the barrister briefed for trial will confer with the defendant very infrequently, perhaps only once, and (owing to the plethora of returned briefs) will often do so in a hurried conference that occurs on the day of the trial or guilty plea.<sup>45</sup> Irrespective of when the barrister receives the brief (although this usually occurs only shortly before that proceeding), the barrister is likely to delay its preparation until they are satisfied that they will not be required to return it.

In Melbourne, barristers enter the case much earlier. Typically, they are briefed to represent the defendant during the contested committal proceeding in the Magistrates' Court. The barrister's participation at the committal is important in two ways. The first involves strategy and tactics. The barrister cross-examines the Crown's witnesses to educate the defendant as to whether a defence exists and, if one does exist, to shape that defence for effective presentation at trial. Secondly (and more importantly for our purposes), the committal effectively glues the barrister to the case until it terminates. Solicitors paid by legal aid rarely brief one barrister for the committal and a different one for the trial.<sup>46</sup> If a barrister is not replaced, then they will have studied the Crown's evidence and

<sup>44</sup> Under the GFS, a barrister briefed for the trial had scant incentive to appear at this hearing — the 'Pleas and Case Management Hearing' ('PCMH') — because the fee for participating was a paltry £100. The barristers' clerk would send a more junior barrister as a substitute who often lacked the experience and confidence to advise the defendant to plead guilty. Without candid advice from the barrister, a defendant who should plead guilty might not do so with the consequence that if they were to plead guilty closer to the trial date, the defendant would lose much of the sentencing discount (receiving 10 per cent at most instead of the maximum 30 per cent). As this fee under the AGFS has not been increased, it is likely that junior barristers (or fledgling solicitors) will continue to represent defendants at this proceeding. For a discussion of the tension created between barristers appearing at the PCMH and those appearing at trial, and between barristers and the defendant, see Tague, 'Barristers' Selfish Incentives in Counselling Defendants over the Choice of Plea', above n 4, 17–21.

<sup>45</sup> Tague, 'Guilty Pleas and Barristers' Incentives', above n 5, 290–1.

<sup>46</sup> See VLA, *Grants Handbook* (12<sup>th</sup> ed, 2007) 193. If the defendant funds the defence, however, the solicitor might hire an expensive barrister for the trial but a less expensive one for the committal in hope that the latter will prepare more thoroughly for that proceeding out of a desire to persuade that solicitor to brief them more often.

tested it during the committal, conferred with the defendant and solicitor over its strength, advised the solicitor about additional ways to buttress the defence, played a role in the selection of the trial date in light of their availability, physically kept the brief as the case progressed through the County Court, and appeared on behalf of the defendant during the proceeding (trial or guilty plea) that resolved the allegations.

In order to trust barristers over those many steps, solicitors in Melbourne expect barristers to work with them and the defendants in ways that would surprise solicitors in the Crown Court because of the belated participation of barristers in England. Melbourne solicitors want barristers to regard themselves as an *ad hoc* member of the solicitor's firm. As such, the barrister must realise that the defendant will be satisfied only if treated with respect by the barrister and will surely be upset (with the solicitor) if treated cavalierly or inattentively by the barrister, no matter how elated (or dismayed) the legal team is by the case's outcome. When conferring with the defendant, the barrister must never fumble with the evidence and must help the defendant to understand it. If the defendant's story is implausible, and the advisability of a guilty plea must therefore be explored, the barrister can candidly identify the holes and inconsistencies in the defendant's position, but must never do so dismissively.<sup>47</sup>

With respect to cases where the defendant funds their defence, solicitors said they often do not defer to the barrister's judgement over strategy and tactics. Instead, they decide how the defendant will plead and, if the defendant does not plead guilty, they decide what the defence will be. The barrister's role at trial is to choose the tactics to execute the defence chosen by the solicitor.<sup>48</sup> If the barrister disagrees with the solicitor's choices,<sup>49</sup> the solicitor expects the dispute to be resolved between them without alerting the defendant. The solicitor wants the defendant to believe that the solicitor is overseeing the defence carefully and wisely, and does not want to risk rupturing the defendant's trust in them.

Publicly-funded defendants are usually represented by an associate of the solicitor.<sup>50</sup> Representing two or three times as many defendants as do solicitors, associates cannot be as intimately involved in the defence of their clients as their employers (solicitors) would like to be with their (paying) clients. Even though associates are forced to defer more to barristers' decisions as to the structure of

<sup>47</sup> In England's Crown Court, by contrast, barristers with a returned brief (or one they delayed preparing) have no time for niceties in their only conference with the defendant on or near the trial's date. Their pointed questions and abrupt manner may prompt the defendant to plead guilty because they are resigned to the fact that the barrister will not advocate loyally at trial.

<sup>48</sup> In practice, then, as in form, the solicitor wants to be treated as the barrister's client, who carries out their instructions as well as the defendant's.

<sup>49</sup> As both are experienced advocates, solicitors said barristers rarely disagreed with their judgement over the plea and defence.

<sup>50</sup> In Victoria, a defendant can retain a private solicitor, then apply to have VLA fund the defence: see VLA, above n 46, 119. VLA solicitors complained that private solicitors often sought funding after stripping defendants of their assets. In order to prevent such behaviour on the part of private solicitors, the legal aid office in NSW (Legal Aid NSW) requires indigent defendants to be represented by its solicitors unless for some reason a private solicitor must be substituted. The percentage of publicly-funded defendants represented (rather than funded) by solicitors in each legal aid office is a figure I could not learn. In England's Crown Court, the only role of the Legal Aid Commission is to fund cases; it employs no solicitors who compete with private solicitors to be selected by indigent defendants.

the defence, they nonetheless expect barristers to consult with them about the decisions that must be made and to defend the option that they have chosen.<sup>51</sup>

In a solicitor's assessment of whether a barrister can be trusted to perform as desired, the fact that the barrister practised as a solicitor is once again important. Barristers carry with them into their new role the model of behaviour that, as solicitors, they expected of barristers.<sup>52</sup>

Missing from this description of the reasons solicitors choose one barrister over another is a trait one might expect solicitors to treasure: an ability to negotiate favourable plea agreements. In turn, if barristers preferred guilty pleas over trials, would they not want to be known for their skill in negotiation? No such skill is required to have the defendant plead guilty to the charges in the presentment, nor is there usually any benefit from entering such a plea near the trial date because most of the sentencing discount will have been lost. For a belated guilty plea to help the defendant, the barrister must persuade the prosecutor to accept concessions.<sup>53</sup> Without these concessions, a solicitor actively involved in the case should oppose ending the case by guilty plea.

Any claim by a barrister to negotiate effectively is difficult to judge, and thus is not a characteristic separating one barrister from another.<sup>54</sup> First, solicitors are unsure about what leads prosecutors to accept guilty plea offers; solicitors said that they could not predict when prosecutors would accept one offer but not another.<sup>55</sup> Secondly, prosecutors, whether employed by the Director of Public Prosecutions or in private practice,<sup>56</sup> do not have an incentive to concede much in encouraging a defendant to plead guilty. Neither the Crown Prosecutor nor the private barrister briefed to prosecute a particular case will have their calendar

<sup>51</sup> Solicitors employed by VLA similarly indicated that they expect the barrister to report to them about the forensic choices they make while at the same time conceding that fewer of them can judge those choices because they lack the advocacy experience that solicitor-associates in private practice have.

<sup>52</sup> In turn, because they have prepared briefs for barristers, barristers know what to expect from solicitors who instruct them.

<sup>53</sup> For example, the prosecution accepts a guilty plea to fewer than all charges or accepts the defendant's version of their behaviour (the defendant admits hitting the victim, but with their fists rather than with a brick, and fewer times than alleged). Most importantly, the prosecution might also agree that while a prison sentence is warranted, immediate incarceration is not.

<sup>54</sup> Of all the interviewees, only one person (a barrister) employed a negotiation method he found had worked. Once persuaded that the prosecution would not prevail on a charge, he wrote a detailed memorandum explaining why. Alerting the prosecution to the problems with its case carried the risk, he acknowledged, that the prosecution could eliminate those problems. However, the effort was nonetheless worthwhile because he did not trust that a private barrister briefed to prosecute, or even a Crown Prosecutor, would put his arguments to the Director of Public Prosecutions (or whoever had to approve the acceptance of the barrister's proposal about the charge) as forcefully as he could in a written submission.

<sup>55</sup> Crown Prosecutors in Melbourne do not propose an outcome but may suggest to the defence barrister or solicitor that they would entertain the defendant's offer to plead guilty to other charges. Private barristers briefed to prosecute are forbidden even to invite an offer unless instructed to do so by the Office of Public Prosecutions in its brief. In Sydney, the Director of Public Prosecutions is more eager to bargain. Under the pilot project, prosecutors are encouraged to bargain with the defence during a formal exchange, if requested by the defendant, while the case is in the Local Court.

<sup>56</sup> In Victoria and NSW, the Director of Public Prosecutions briefs private barristers to prosecute individual cases when a Crown Prosecutor is not available.

swamped by other cases if the current one does not end by guilty plea.<sup>57</sup> If the Crown Prosecutor signed the presentment, they belie the decision about the appropriate charges unless a guilty plea to fewer than all charges has become justified by the deterioration of the evidence of guilt in the interim.<sup>58</sup> A private barrister with a prosecution brief is even less interested in ending the case by guilty plea. The private barrister, who is forbidden to accept a guilty plea without the Director of Public Prosecution's approval, might hesitate to suggest that the defendant's plea offer ought to be accepted for fear of impugning the Crown Prosecutor's choice of charges. Moreover, the private barrister is reluctant to accept a guilty plea because of its effect on earnings.<sup>59</sup> If the trial is expected to last five days, the barrister will receive a fee for only the trial's first day when the defendant enters a guilty plea. Unless they double-book, private barristers when prosecuting (as well as defending) will thus have no trial brief to replace the payment lost for the four other days that the aborted trial was expected to last.<sup>60</sup>

Finally, the attractiveness of plea agreements diminishes for defendants if they do not eliminate uncertainty or at least minimise the risk of a worse outcome in a trial. While the prosecutor can agree that immediate custody is not mandated, they cannot reveal to the court the upper or lower limits of the prison term that the Crown is prepared to accept.<sup>61</sup>

Thus, without an agreement over the sentence, the defendant is unsure of the guilty plea's value.<sup>62</sup> Judges are expected to discount the sentence to reflect the guilty plea's utilitarian value (the resources saved), but barristers are sceptical that their indication of having done so is more than a pious incantation. With the amorphous method of selecting the sentence — the 'instinctive synthesis' —

<sup>57</sup> Crown Prosecutors in Melbourne told me they typically prepare only one (often very long) case at a time.

<sup>58</sup> Crown Prosecutors in Melbourne expressed no fear of trying cases that could result in acquittal. Nestled within the Office of Public Prosecutions, but independently appointed by the State Parliament of Victoria, they are immune from criticism were a jury to acquit. Moreover, if an acquittal was anticipated, their attitude was that the jury should nevertheless decide. Thus, unlike many American prosecutors, they did not struggle to convict the defendant of something (or anything) if the prosecution's case was weak at initiation or initially strong but deteriorating.

<sup>59</sup> This same reason explains why barristers briefed to defend prefer trials over guilty pleas.

<sup>60</sup> The Office of Public Prosecutions in Victoria pays experienced private barristers (12 years or more since signing the Bar roll) a brief fee of \$1400 for the first day of a trial in the County Court and \$850 for subsequent days: Office of Public Prosecutions, *Briefing Fees Schedule* (4 February 2008) <<http://www.opp.vic.gov.au/wps/wcm/connect/Office+Of+Public+Prosecutions/resources/file/eb22894ebe7eb05/BriefingFeesSchedule-04Feb2008.pdf>>. The Manager commented that '[i]f the matter settles on the first day of the trial [by guilty plea] ... we endeavour to ensure that that barrister picks up other work with us for those days the trial would have run': Email from Rod Gray (Manager, Office of Public Prosecutions) to Peter Tague, 27 September 2007. Barristers interviewed, however, said they rarely received work immediately to offset the trial days otherwise lost by the guilty plea.

<sup>61</sup> The prosecutor thus cannot provide the certainty over sanction that drives plea bargaining in the US. In *Baroudi v The Queen* [2007] NSWCCA 48 (Unreported, Sully, Howie and Price JJ, 27 February 2007), the Crown Prosecutor was chastised for stating no opposition to a particular non-parole period urged by the defence. The Court emphasised that '[i]t is for the Judge alone to decide the sentence to be imposed': at [29] (Price J), citing *R v Olbrich* (1999) 199 CLR 270. Cf *Federal Rules of Criminal Procedure* 2007 (US) r 11(c)(5)(B) (a defendant can withdraw a guilty plea if the judge rejects the parties' agreement over sanction).

<sup>62</sup> Another problem is the difficulty of predicting which judge will choose the sentence: see below n 135 and accompanying text.

judges in Victoria are strongly discouraged from disclosing the discount or the starting sentence to which they applied the discount.<sup>63</sup>

The result of these ambiguities over the value of negotiation is that solicitors ignore it as an ostensible skill that they require a barrister to possess. Instead, solicitors want barristers to have a close relationship with them and the defendant. Barristers should therefore not feel compelled to persuade defendants to enter guilty pleas in order to demonstrate prowess as negotiators, and will thus be more inclined to prefer a trial.

### C Fees

Having discussed how barristers obtain work and the expectations held of them by solicitors, we now turn to the first of their two selfish incentives: maximising remuneration. When being paid by defendants themselves, the barrister clearly prefers trials over guilty pleas because both the barrister and the solicitor will collect more from the former than from the latter. When the defence is publicly-funded, however, the barrister's preference (as to trial or guilty plea) will depend more on their availability. In the Monday-Wednesday illustration discussed in Part II, the barrister prefers to end Monday's case by guilty plea in order to keep Wednesday's brief. However, that selfish inclination will be mitigated, as discussed in Part IV, by the fear of being sanctioned by Monday's solicitor if the barrister were to try to exploit the payment scheme by pressuring a defendant to plead guilty.

Consider the barrister's incentives when acting on behalf of a defendant who pays for their own defence. The barrister typically receives a daily fee rather than a single fee for the entire case.<sup>64</sup> With daily fees ranging from \$1200 for an inexperienced junior barrister to \$7500 for an exalted Senior (or Queen's) Counsel, the barrister earns more for a trial.<sup>65</sup> For a trial expected to last five

<sup>63</sup> See *R v O'Brien* (1991) 55 A Crim R 410, 414 (Young CJ, Crockett and Phillips JJ). The Victorian Sentencing Advisory Council also opposes providing these facts, although it does recommend giving judges discretion to indicate, if the defendant asks, whether immediate imprisonment will follow a guilty plea: Sentencing Advisory Council, *Final Report*, above n 7, 116, 121. Providing an assurance of no immediate imprisonment may induce more guilty pleas, but the numbers are uncertain because prosecutors can now agree that the same outcome is warranted. Despite being encouraged by the NSW Court of Criminal Appeal to disclose the discount in *R v Thomson*; *R v Houlton* (2000) 49 NSWLR 383, 411 (Spigelman CJ), judges in Sydney (according to the barristers interviewed) often do not do so, with the result that the barristers were as uncertain of a guilty plea's value as their counterparts in Melbourne.

<sup>64</sup> A bulk (or 'all-in') fee is a single charge, say of \$25 000, for whatever work the barrister does, irrespective of how long the case takes. With such a fee, the defendant risks the possibility that the case will end more quickly (and the barrister risks that it will take longer) than predicted. Thus, the barrister's imputed yield per hour soars if the defendant pleads guilty, and plummets if the trial exceeds its estimated length. Barristers' clerks informed me that this sort of fee is rarely used today because of the second possibility. Not surprisingly, as this type of fee also tempts the barrister to prefer guilty pleas, it was used in the only case described to me that might have involved chicanery by a barrister. In seeking advice as to whether or not to challenge his guilty plea, an unhappy defendant told a second barrister that his first barrister had persuaded him to plead guilty shortly before the trial when that barrister learned that the defendant could not pay the fee demanded by the barrister, who then settled for an amount about two-thirds of what he originally wanted.

<sup>65</sup> These amounts formed the range charged per day by barristers in one clerk's chambers in Melbourne. As a favour to a solicitor, however, or to earn a fee when no other briefs were avail-

days, then, that junior would lose \$4800, and the Senior Counsel over five times that amount, if the trial never began because the defendant pleaded guilty. Solicitors who also charged by the day<sup>66</sup> admitted being crestfallen when barristers changed their recommendations at the last moment in order to urge a defendant to plead guilty.<sup>67</sup> A guilty plea, however, arguably harms the barrister more than the solicitor. Like a private barrister who prosecutes, the defence barrister will have no court appearances scheduled in other cases and thus might earn nothing over the four trial days lost to the guilty plea.<sup>68</sup> The solicitor, on the other hand, could continue to collect fees (if charged by the hour or by the day) from other defendants for preparing their cases.

To offset the possible loss of daily fees, barristers and solicitors sometimes charge a 'cancellation' or 'disappointment' fee to protect themselves if the case ends more quickly than expected. This fee is typically triggered when, without the barrister's or solicitor's urging, the defendant decides to plead guilty. This fee offsets losses in relation to business which the barrister might have rejected to concentrate on the defendant's case until its anticipated end. However, it would be audacious for a barrister to enforce this provision when it was due to their persuasion that the defendant gave up a trial to plead guilty. Thus, barristers are unlikely to use this sort of fee as part of a covert effort to inveigle a defendant to plead guilty to further their interests.

Moreover, a consideration of payments in publicly-funded cases reveals that the regimes in Victoria and NSW are simpler than England's GFS. In England's Crown Court, the barrister's remuneration includes fees for preparation and for the number of prosecution witnesses and pages of evidence, with those amounts varying depending upon how the case is resolved (trial, cracked trial or guilty plea), and two other fees (a 'refresher'<sup>69</sup> and a trial uplift fee) for each day after the first if the case is tried. Many of these fees vary depending on the nature of the crime(s) charged.<sup>70</sup> Despite this Byzantine complexity, barristers can

able, barristers, according to this clerk, might shave the fee if a defendant could not pay what they normally expected.

<sup>66</sup> From my conversations, I infer that solicitors may charge a bulk fee for preparing the case but a daily fee for assisting the barrister in court during the trial. One solicitor said that he increased the bulk fee by exaggerating the case's length and then refunded part of the fee if the case ran no longer than he expected.

<sup>67</sup> Not only would the solicitor lose the fees for each day of the trial, the solicitor would have spent much more time preparing a case that they anticipated would be tried. In publicly-funded cases, by contrast, the solicitor's daily fee for assisting the barrister during trial is comparatively small (\$526 in Victoria), while the solicitor would receive a larger fee for preparation (\$1311) irrespective of whether or not the case was tried or cracked: see VLA, above n 46, 138.

<sup>68</sup> Unless the barrister double-books, they should have no other briefs requiring court appearances during those four days. In Melbourne and Sydney, barristers and clerks said it was very difficult to find new work to replace the lost days (even though the barrister might turn, for example, to paperwork requiring completion, an advice on evidence, or a pending appeal). Even in England, where with the number of returned briefs one might expect an experienced barrister to find replacement work, clerks said this was not so because most of the returned briefs were in less serious cases which they reserved for newer barristers: see Tague, 'Barristers' Selfish Incentives in Counselling Defendants over the Choice of Plea', above n 4, 15.

<sup>69</sup> This catchy, if vague, term has been replaced by a pedestrian term ('daily attendance fee') in the AGFS. The fee paid by VLA and Legal Aid NSW for each trial day after the first is called a 'daily fee'.

<sup>70</sup> See above n 31 and accompanying text.



calculate precisely whether they will earn more if the case cracks or proceeds to trial.<sup>71</sup> More importantly, this complexity enables the barrister to disguise any machinations because the objective observer's intuitive sense that trials are preferable because of larger basic fees could be wrong if, say, there were many pages of evidence.<sup>72</sup>

In the two Australian states, the barrister's brief fee (for preparing for trial and the trial's first day) impliedly reflects the number of pages of prosecution evidence, but the fee is not per page and no fee is a function of the charges.<sup>73</sup> Thus, barristers in Victoria and NSW can also accurately calculate the fee they will receive.

In Victoria, a defence barrister who is compensated by Victoria Legal Aid ('VLA') for defending at the committal is expected to continue to represent the defendant in the County or Supreme Court.<sup>74</sup> Focusing on the County Court, the fees differ radically depending upon when the case ends. If the defendant pleads guilty during a pre-trial proceeding, the barrister earns \$1108.<sup>75</sup> From that comparatively paltry amount, the barrister's fee nearly doubles (\$1960) if the defendant does not plead guilty or not until immediately before the trial is scheduled to begin.<sup>76</sup> If the case is tried, the barrister also receives \$845 for each day of the trial after the first.<sup>77</sup> To pay the same basic fee for a trial or cracked trial is defensible on the assumption that the barrister expected a trial and had prepared to litigate. However, this equality creates a temptation for self-dealing that is explored in Part III(D).

In order to understand how fees could influence a barrister's preference for guilty pleas or trials in publicly-funded cases, consider the barrister's incentives in two instances. First, a trial which is set to begin on Monday is expected to last five days. The barrister's interest is the same as it was when the defendant paid the fee. The barrister should carry no briefs for other trials set to begin before the following Monday. Barristers thus prefer for the case to be tried because if the

<sup>71</sup> For examples of this complexity and the temptations thereby created, see Tague, 'Barristers' Selfish Incentives in Counselling Defendants over the Choice of Plea', above n 4, 11–22.

<sup>72</sup> With the same number of pages of evidence and witnesses, the compensation can be more or less for a cracked trial or trial depending upon the charge: see Graham Cooke, 'On Graduated Fees' (18 December 2002) 10 *Archbold News* 4.

<sup>73</sup> In Victoria, the barrister is paid an hourly rate (\$144 for County Court matters and \$205 for the Supreme Court) for each 90 pages of Crown evidence that exceeds 720 pages: see VLA, above n 46, 192–3. In NSW, a barrister's fee for reading and preparing the prosecution's evidence is said to be by negotiation with Legal Aid NSW: see Legal Aid NSW, *Fees for State Law Matters for Approvals Made on or after 1 July 2007* (2007). But I was told by junior counsel that instead a flat fee is paid for each 300 pages of prosecution evidence after the first 300 pages. That fee is the amount for each trial day after the first (\$987).

<sup>74</sup> VLA, above n 46, 193. The barrister's fee for the first day of a committal is \$665, and for a second, if necessary, \$600: at 134. This fee structure — a lower fee for the second day and no fee for additional days — is designed to encourage barristers to examine expeditiously. Nevertheless, it would be rare for that payment to be denied for days after the second: Trumble, above n 33. In NSW, committals are rarely contested (although that is the impression of the interviewees; they offered no study to confirm the point), and barristers are thus not briefed when this proceeding involves no more than the Crown 'handing-up' a brief of its evidence.

<sup>75</sup> VLA, above n 46, 136. That fee consists of a brief fee (\$676) and a fee for conferences (an hourly conference rate of \$144, to a maximum of \$432).

<sup>76</sup> Ibid 138. The higher fee also consists of a brief fee (\$1240) and up to \$720 for conferences.

<sup>77</sup> Ibid.

defendant were to plead guilty the barrister would lose fees for four days, a total of \$3380.

In a second setting — the one discussed in Part II involving briefs for Monday and Wednesday — barristers in Victoria may prefer to crack Monday's case if they fear having to return Wednesday's brief. If Monday's two-day trial proceeds but lasts three days, the barrister earns \$2930 (a brief fee and two daily fees) but must return Wednesday's brief. Because that second brief is returned, the barrister will almost invariably be denied remuneration (by VLA) for any preparation undertaken.<sup>78</sup> Instead, if Monday's case cracks, and Wednesday's trial lasts two days, the barrister earns \$3325 (two brief fees and one daily fee) for the same number of days in court. If the barrister could find a brief for Thursday (when Monday's trial ends on Wednesday), then they would do better by trying Monday's case (the difference in payment between a brief fee and a daily fee for Thursday), but is not likely to find that second brief.<sup>79</sup> Of course, barristers might eschew these sorts of calculations as undignified and unprofessional, or as involving too many imponderables to be worth the effort to plot and execute. However, embedded in the fee structure is this temptation to take advantage of Monday's defendant's trust that the barrister honestly believes that their recommendation to plead guilty is the better choice for the defendant. As discussed in Part IV, this selfish reason to exploit the defendant is trumped by the barrister's concern not to inconvenience the instructing solicitor and the fear of being sanctioned by that solicitor.

The Monday-Wednesday problem is likely to tempt only newer barristers to take advantage of Monday's defendant. Those with more experience and proven ability, especially Senior Counsel, will defend in cases where the trial is expected to last a week or longer.<sup>80</sup> They would accept Monday's brief only if assured by the solicitor that the defendant would plead guilty. If Monday's defendant did not plead guilty, the return of Wednesday's brief would result in a serious financial loss. It is unlikely a barristers' clerk could find other work to fill, say, the 10 trial days Wednesday's case would have taken. And barristers cannot themselves fish for replacement work by contacting solicitors.

The Monday-Wednesday problem, however, can be generalised to apply to experienced barristers with overlapping commitments. Suppose that in the midst of a two-week trial the barrister is offered a brief for a multi-day trial scheduled to begin shortly before the current trial is predicted to end. Unless booked for that next period, the barrister is tempted to accept the new brief.<sup>81</sup> To avoid irritating the solicitor offering this new brief, the prudent barrister reveals that the solicitor may be inconvenienced if the barrister's present obligation forces

<sup>78</sup> Interview with Bill Trumble, Cost Adviser, VLA (Melbourne, 12 February 2007).

<sup>79</sup> It is unlikely because, it will be recalled, they cannot rely on their clerk to find replacement work.

<sup>80</sup> Senior Counsel are rarely briefed to appear in County Court cases funded by VLA. VLA's Cost Adviser indicated that in the year preceding our conversation, Senior Counsel had appeared in only four cases in that Court: Trumble, above n 78.

<sup>81</sup> Of the barristers interviewed some were booked for as long as the next six months; others had trials booked that far (or longer) in the future, but with gaps they hoped to fill with returned briefs for trials, guilty pleas or bail applications.

them to return the new brief.<sup>82</sup> If the solicitor remains interested, the barrister scans the brief to see if they can find the time and energy to prepare the case without harming their efforts for the defendant presently at trial. The barrister accepts the brief if the issues are simple. However, if there is copious data to analyse, difficult legal arguments to fashion or considerable expert testimony to understand, the barrister's decision may turn on the brief's condition. If the solicitor has not shirked — if the solicitor has assembled and organised the evidence, identified the issues and provided a plan — the barrister accepts.

However, this acceptance is provisional; the barrister's current trial must end near its predicted termination. To ensure that the barrister can keep the second brief, does the barrister attempt to shorten the trial by trimming the cross-examination, for example, or not calling witnesses? Barristers deny doing so. Instead, they confer with the solicitor offering the new brief, often each day, about the trial's progress and its likely conclusion. With this information the solicitor assesses whether the barrister will be able to appear, and thus whether or not to stay with that barrister or search for a different one. Moreover, the second trial's inception might be delayed a day or two if the listing officer or the judge believes that such an interruption would be shorter if the barrister was ready to begin immediately after completing their first trial than if a different barrister had to be briefed.

Additionally, Senior Counsel have another consideration that encourages them to take trials that overlap. A Senior Counsel's junior can take command in their absence. Solicitors know this and are not upset if the Senior Counsel is occupied elsewhere at the trial's commencement, trusting that their junior will have adequately prepared to act independently, to impress them and the Senior Counsel. Consequently, while overlapping commitments may tempt inexperienced barristers to persuade a defendant to plead guilty, fees will generally incline barristers, particularly more experienced ones, to prefer trials.

#### *D Cracked Trials*

Despite evidence that barristers generally prefer trials over guilty pleas, there remains one piece of provocative evidence that suggests the reverse. Why do so many defendants plead guilty on the day of their trial if such a plea reduces, sometimes significantly, the fees the barrister would earn from a trial? Are cracked trials caused by barristers' subterfuge?

When a trial cracks, the barrister may have contributed to the defendant's decision to plead guilty by persuading a defendant who initially wanted to contest guilt to change their mind on the day of the trial. The Monday-Wednesday illustration exposes the barrister's selfish motive to inveigle one of the defendants to change their plea.<sup>83</sup> The barrister could also persuade the defendant to delay pleading guilty for tactical reasons.

<sup>82</sup> There are also ethical restrictions on double-booking; see below n 105.

<sup>83</sup> We will examine what deters this behaviour in Part IV.

Consider the following example to appreciate the potential benefit of delaying the entry of the guilty plea.<sup>84</sup> Despite a sharp challenge by the defence barrister at the committal, the prosecution's evidence of guilt seems impregnable on one count (the less serious one) but not invincible on the other. The best outcome, the barrister concludes, is for the defendant to plead guilty to the lesser charge. The defendant vacillates as to whether to accept this advice. By the time the defendant is persuaded to let their barrister (or solicitor) negotiate such a plea, the case has reached the case conference stage in the County Court.<sup>85</sup> At this point, the barrister counsels the defendant to wait until the trial to seek that result. This seems irrational: as the discount's size is inversely related to the timing of the guilty plea, most of the discount will be lost by delaying the plea. What could be the barrister's reason, other than pursuing self-interest, in obtaining the brief fee of \$1240 for a cracked trial (the same, it will be recalled, as for a trial), rather than the much smaller fee for a guilty plea (\$676)?

The defendant could also benefit by the delay. The value of this manoeuvring depends upon how the prosecution negotiates. In England's Crown Court, for example, barristers do not want to negotiate with Crown Prosecutors because, assessing themselves by the accuracy of the charges selected rather than by the case's outcome, they commonly refuse to accept guilty pleas to fewer than all charges.<sup>86</sup> The same is true when negotiating with the Office of Public Prosecutions in Victoria. If, in preparing the presentment, the Crown Prosecutor cannot be persuaded to include only the less serious charge, negotiations with the Office of Public Prosecutions' solicitor responsible for organising the case for trial are not likely to end in the defence barrister's desired result. Lacking trial experience before juries, the Office of Public Prosecutions' solicitor will not want to appear to countermand the Crown Prosecutor's assessment of the strength of the evidence.

Thus as a tactical matter there may be no choice for the defendant but to postpone plea negotiations until a Crown Prosecutor begins to prepare the brief for trial, perhaps no more than a week or two before the trial's scheduled inception. The Crown Prosecutor's review of the evidence will be the first time a prosecutor with experience in litigating before juries will have studied the evidence since

<sup>84</sup> For a discussion of the barrister's incentives over the timing of the plea in the Crown Court, see Tague, 'Barristers' Selfish Incentives in Counselling Defendants over the Choice of Plea', above n 4, 17–21.

<sup>85</sup> During this proceeding the defendant enters a plea, a trial date is set if the plea is not guilty, and matters preparatory to the trial are resolved if possible.

<sup>86</sup> Care must be taken with the term 'Crown Prosecutor'. In England, 'Crown Prosecutors' are employed by the Crown Prosecution Service and usually function like solicitors in the two Australian jurisdictions (preparing the case but not presenting it in court). Known as 'high court advocates', about 11 per cent of Crown Prosecutors are now qualified to advocate in the Crown Court: Interview with Ian Brownlee, Chief Policy Director, Office of the Director of Public Prosecutions (York, 3 August 2007). In Victoria and NSW, by contrast, a 'Crown Prosecutor' is a barrister who presents in court cases prepared by a solicitor in the Office of Public Prosecutions. For a discussion of how Crown Prosecutors view themselves and plea bargain, see Tague, 'Barristers' Selfish Incentives in Counselling Defendants over the Choice of Plea', above n 4, 20–1. As the Crown Prosecution Service wants its Crown Prosecutors to litigate more in the Crown Court, thus displacing private barristers (a plan that I was told about by Crown Prosecution Service officials in London in the summer of 2007), it may begin to concentrate more on the outcome rather than on the apparent accuracy of the charges.

the presentment was prepared. If the Crown Prosecutor agrees with the defence barrister's assessment of the evidence, they may readily accept the defendant's offer to plead guilty to the lesser count.<sup>87</sup> Ideally for the defendant, the Crown Prosecutor might dismiss the more serious charge if it appears no longer provable rather than retain it as a bargaining chip to induce the defendant to plead guilty to the lesser charge that could be proven.<sup>88</sup> Were this to occur, the defendant might opt for a trial on the lesser count in the hope that the jury would not convict.

Has the defendant lost or gained anything by this delay? The discount for pleading guilty has all but disappeared. But the judge, in selecting the nonparole period and the head sentence, is bound to start from the sentence appropriate for the lesser charge.<sup>89</sup> The term of imprisonment may ultimately be less than if the defendant had (in theory) received the highest discount by pleading guilty to both charges in the Magistrates' Court.<sup>90</sup> No study has been done to see if this analysis is accurate, but the interviewees were intrigued that it could be.

Of course, the Crown Prosecutor might refuse to compromise and insist instead on a guilty plea to both charges. The Crown Prosecutor refuses because, like the defence barrister, they are confident that a jury will convict on the lesser charge at the very minimum. Thus, a trial is without risk. And although the evidence of the more serious charge is weak, it is, in the Crown Prosecutor's view, sufficient to justify a jury's consideration.

If, as the advocates predict, the jury convicts the defendant only of the lesser charge, the defendant's sentence on that charge ought to be lower than it would have been had they pleaded guilty to both charges. The defendant should not be penalised for forcing a trial when the jury agreed that the defendant is provably guilty of no more than the lesser charge.

Even if the jury convicts on both charges, the sentence is uncertain. Recall that barristers are unsure that the promise of a discount converts into a benefit, especially when the guilty plea occurs immediately before the trial begins.<sup>91</sup> Of equal importance, the defendant may not be harmed by a trial (as discussed in

<sup>87</sup> Similarly, barristers in both cities indicated that only a Crown Prosecutor would accept a description of the defendant's behaviour that reduced their culpability.

<sup>88</sup> Crown Prosecutors assured me that they would do this and offered anecdotes as proof. The tactical lesson is that if the evidence is crumbling, the guilty defendant should delay pleading in hope the charge will be withdrawn.

<sup>89</sup> See Richard G Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2<sup>nd</sup> ed, 1999) 69.

<sup>90</sup> The 'sentencing snapshots' for various crimes in Victoria do not distinguish the sentences by type of plea or the timing of a guilty plea. With certain offences (theft, burglary and handling stolen property), the infrequency with which imprisonment is required and the apparent brevity of the average length of imprisonment suggest that it might behove a defendant, unless particularly risk-averse, to delay pleading guilty as long as possible in the hope of the prosecution's case crumbling. For all three offences, the median length of imprisonment between 2001–06 was one year and the highest average was two years and three months (for handling stolen goods in 2005–06): Sentencing Advisory Council, *Sentencing Snapshot No 16: Sentencing Trends for Handling Stolen Goods in the Higher Courts of Victoria, 2001–02 to 2005–06* (2007) 4; Sentencing Advisory Council, *Sentencing Snapshot No 17: Sentencing Trends for Theft in the Higher Courts of Victoria, 2001–02 to 2005–06* (2007) 4; Sentencing Advisory Council, *Sentencing Snapshot No 10: Sentencing Trends for Burglary in the Higher Courts of Victoria* (2006) 4.

<sup>91</sup> See above nn 62–3 and accompanying text.

Part V). Two conclusions follow. First, the barrister's poker-like manoeuvring may benefit the defendant regardless of whether the defendant pleads guilty or has a trial.<sup>92</sup> And secondly, the barrister's advice that could appear self-interested may in fact be helping the defendant.

The analysis so far has translated ostensibly selfish behaviour by the barrister into advice intended to further the defendant's interests. But barristers are not saints. They know, for example, how to mulct legal aid to increase their remuneration. The question is whether the defendant is harmed in the process. Consider the following questionable behaviour that barristers in Sydney said occurred occasionally. Two weeks before a Monday trial date the barrister is unexpectedly told by the Crown Prosecutor that the latter will accept a guilty plea to a lesser charge.<sup>93</sup> The defence barrister responds that while expecting the defendant to agree, they have been negotiating without the defendant's authorisation to strike that bargain. That is false: the defendant, the barrister knows, will embrace such an outcome.

On the Friday before the trial, the barrister informs the Crown Prosecutor not to prepare over the weekend, a coded message to expect a guilty plea. On Monday, the barrister asks the judge to adjourn the case until the next day because the defendant is torn over the plea. On Tuesday when the defendant pleads guilty, the barrister collects a brief fee for Monday and a daily fee for Tuesday (and for Wednesday, too, if they can string the case out another day), all the while knowing that the defendant would have switched pleas two weeks earlier if told by the barrister to do so.

In this process the defence barrister manipulates legal aid without doing much harm to the prosecution or defendant. The prosecutor stops preparing and notifies the police to do likewise. The defendant's sentence is no worse than it would have been had the defence informed the court two weeks earlier of the defendant's intent to plead guilty.<sup>94</sup>

<sup>92</sup> See Peter W Tague, 'Tactical Reasons for Recommending Trials Rather than Guilty Pleas in Crown Court' [2006] *Criminal Law Review* 23.

<sup>93</sup> In a related instance, a barrister in Sydney was tormented over whether to notify the prosecution and the court when two weeks before the trial a defendant revealed his willingness to plead guilty after the barrister had advised him to think about doing so. To salvage whatever remained of the discount, the barrister thought that he had to disclose the defendant's decision. By disclosing, however, the barrister believed he would lose the brief fee for a trial or cracked trial and be relegated to the lower fee for a guilty plea. While he did disclose the defendant's decision, he thought that the lesson was not to raise the subject of a guilty plea with the defendant until immediately before the trial (thereby ensuring he would earn the higher basic fee in case the defendant decided to plead guilty).

<sup>94</sup> This is an important assumption, but most barristers (other than the one mentioned in the preceding footnote) thought the sentence would be the same. Indeed, they thought that the delay did not jeopardise the defendant's ability to obtain the highest discount (25 per cent) because judges have been willing to interpret the test for that discount generously (where the guilty plea was made at the earliest possible opportunity): see *Cameron v The Queen* (2002) 209 CLR 339. But such inventive (and disingenuous) interpretations may end: see *R v Stambolis* (2006) 160 A Crim R 510, 513–14 (Howie J), where a discount was criticised when the defendant's belated plea had no utilitarian value. And legal aid officials said that as part of the pilot project's effort to encourage guilty pleas in the Local Court they understood the test for a discount would be interpreted more strictly by the judiciary in the District and Supreme Courts.

Commenting on this scam, officials in Sydney's legal aid office were not aghast at the barrister's conduct.<sup>95</sup> As legal aid's provisions do not explicitly forbid this intrigue, and because an attempt to uncover the barrister's behaviour would be handicapped by the lawyer-client privilege, they thought that delaying the defendant's guilty plea would be irresistible to barristers. They hoped the pilot project in the Local Court, which encourages more guilty pleas, would limit the opportunities for barristers to pursue their self-interest in this setting by reducing the number of cases that reach the District Court.

#### IV SANCTIONS DETERRING SELF-INTERESTED BEHAVIOUR

The returned brief, when caused by double-booking, is a pernicious evil in England's Crown Court. Returned briefs undermine the laudable cab-rank rule and thus deprive defendants of the value of having an informed and loyal agent (the solicitor) select a barrister for the defendant. However, self-interested barristers could hide the pursuit of their ends through double-booking by recommending a guilty plea in one case to avoid the return of that case's brief.

With nearly 50 per cent of defence briefs returned in the Crown Court,<sup>96</sup> one might expect an uprising among solicitors dismayed by how cavalierly they and their defendants are treated by barristers. But solicitors have acquiesced, perhaps because they recognise that barristers have had little incentive to prepare cases,<sup>97</sup> or because the real culprits are the barristers' clerks who arrange the barristers' calendars rather than the barristers themselves.<sup>98</sup>

The number of briefs 'flicked' in Sydney and Melbourne, by contrast, is miniscule. Most of the barristers interviewed in those two cities claimed to have never returned a brief or double-booked trials;<sup>99</sup> when questioned, they vowed that they had not done so in language that was occasionally theatrical.<sup>100</sup> Various sources confirm that briefs are returned infrequently — for example, when asked how many briefs had been returned by barristers in his chambers over the last year, a clerk in Melbourne paused before remembering the number was two; the clerk of a second chambers estimated that his barristers had returned more, but

<sup>95</sup> Told of this behaviour by barristers in Sydney, a barrister in Melbourne labelled it as 'dodgy'. He expected judges to be 'angry at the wasted resources' when defendants waited two weeks to plead guilty 'because a different trial could have proceeded'. Legal aid officers were, however, upset when barristers (and solicitors) sought undeserved payments from legal aid by exaggerating the number of days a trial took. But this lie could be caught by cross-checking the barrister's and solicitor's applications for payment against each other and against the court's records.

<sup>96</sup> See Zander and Henderson, above n 25.

<sup>97</sup> The studies of returned briefs in England unfortunately do not indicate whether their rate differs among barristers by date of call, as well as the nature of the cases that are returned: see, eg, *ibid.* One imagines that most of the cases are short trials, and most of the barristers are inexperienced juniors. More senior barristers briefed to defend in longer trials have powerful incentives not to return those briefs: the fee lost could be high, finding replacement work difficult and the instructing solicitor might be upset if they cannot find an equally able replacement.

<sup>98</sup> Of course, barristers could instruct their clerks that they do not want to be double-booked.

<sup>99</sup> Given that they were aware of the purpose of my inquiry, they may have conveniently ignored instances when they have in fact done so.

<sup>100</sup> 'Let God destroy my voice box if I were to [flick a brief],' exclaimed one barrister.

no more than five per cent.<sup>101</sup> Of the private solicitors interviewed, one in Melbourne could remember five of his briefs that had been returned, the highest number of returned briefs reported by a solicitor in either city over the last year.

The explanation for the dramatically lower number of returned briefs in Melbourne and Sydney is not that those barristers are less selfish, nor is it that those barristers risk being formally sanctioned in ways that do not apply in England. Indeed, in at least two instances the reverse is true. In England, a defendant who feared having been harmed by a returned brief might now sue the barrister for negligence given that barristers in England (but not in Australia) have been stripped of immunity from malpractice claims.<sup>102</sup> Also, in an appeal against conviction, a defendant in the Crown Court can directly charge a barrister with having performed ineptly or inappropriately.<sup>103</sup> In Australia, such a finding is insufficient as the inquiry is framed in more general terms (whether a miscarriage of justice occurred).<sup>104</sup>

Double-booking is forbidden by the barristers' codes of conduct in all three jurisdictions.<sup>105</sup> An inquiry by the Bar or its independent overseer into an allegation charging a barrister with having double-booked and having harmed a defendant as a result could prove embarrassing to the barrister, even if exonerated, and would surely demand their unwanted attention.<sup>106</sup> But because there seems to be no public record of such inquiries, this sanction is probably not a particularly vibrant deterrent.<sup>107</sup> Like lawsuits and appeals against conviction,

<sup>101</sup> A clerk in Sydney, on the other hand, estimated that the barristers in her chambers, one with far fewer members than in the two in Melbourne, returned about 35 per cent of their briefs but that most were taken by another barrister in chambers.

<sup>102</sup> *Arthur J S Hall & Co v Simons* [2002] 1 AC 615. The likelihood that such a lawsuit would succeed, however, is small. See Tague, 'Barristers' Selfish Incentives in Counselling Defendants over the Choice of Plea', above n 4, 9 fn 31. While barristers retain immunity in Australia from liability for negligence, a returned brief might not qualify under the common law test of out-of-court work that affects the case's conduct in court: see *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1.

<sup>103</sup> See Peter W Tague, 'Faulty Adversarial Performance by Criminal Defenders in the Crown Court' (2001) 12 *King's College Law Journal* 137.

<sup>104</sup> See, eg, *Nudd v The Queen* (2006) 225 ALR 161, 162, where Gleeson CJ stated: 'The appellant's criticisms of the conduct of his trial counsel were relevant to the issue, but the issue was whether there was a miscarriage of justice.'

<sup>105</sup> In NSW and Victoria, a barrister must not double-book without the permission of the person offering the second brief and without notifying the instructing solicitor of the first brief: The NSW Bar Association, *The New South Wales Barristers' Rules* (2001) r 90; The Victorian Bar Inc, *Practice Rules* (2005) r 95. In England, despite being proscribed, double-booking occurs because it helps barristers to survive economically in light of the difficulties caused by the listing system in predicting which cases will go to trial: Interview with Mark Stobbs, Director of the Bar's Professional Standard Committee (London, 1 August 2007); Bar Standards Board, *Code of Conduct* (8<sup>th</sup> ed, 2004) s 1 [603(b)]. Barristers in Melbourne also said that they double-booked to avoid going 'broke'.

<sup>106</sup> Germane to the reluctance of barristers to pressure defendants to plead guilty, one barrister in England admitted that she would be 'petrified' of a Bar inquiry into such an allegation: see Tague, 'Barristers' Selfish Incentives in Counselling Defendants over the Choice of Plea', above n 4, 9–10.

<sup>107</sup> According to a member of the Victorian Bar's Professional Conduct Committee, barristers in Victoria have been disciplined for double-booking, but I could not learn the details. The Victorian Legal Services Commissioner, to whom jurisdiction over such complaints has been transferred, has not received one in the two years of the office's existence: Interview with Janet Cohen, Director of Investigations, Legal Services Commissioner (Melbourne, 15 March 2007). The Legal Services Commissioner in NSW said that his office had received very few complaints



this third formal way of deterring barristers does not explain why fewer briefs are returned and less double-booking occurs in the Australian jurisdictions.<sup>108</sup>

Instead, the deterrence resides in three features of practice in Melbourne and Sydney: barristers control their calendars; they recognise the inconvenience that a flicked brief causes the solicitor; and they fear the non-legal repercussions of flicking a brief.<sup>109</sup> The cumulative effect of these aspects of practice make barristers reluctant to return a brief. These aspects are considered in turn.

First, most barristers arrange their own calendars. Unlike England where the barristers' clerk is the gateway to each barrister, solicitors in Melbourne and Sydney contact barristers directly. By accepting the brief, barristers themselves promise to represent the defendant. As in England, the inverse is not true: barristers will not ask solicitors for work during fallow times. However, as an illustration of their closer relationship, Melbourne barristers will contact a solicitor to learn if a brief they had previously refused (because they were busy with another defendant) is still available when their case unexpectedly ends and they have some empty days in their calendar as a result.

One impetus for double-booking in London was the interest of clerks in having barristers in chambers working continuously at a time when the clerks' earnings were a percentage of the gross revenues of the chambers.<sup>110</sup> While most clerks in Melbourne are paid in the same way, the minor role they play in securing briefs for barristers means (according to the interviewees) that clerks do not pressure barristers into accepting more work than that which a particular barrister wants. Moreover, even if their clerks wanted them to churn through briefs, less experienced barristers in Melbourne repeatedly said that they would resist the temptation. They instead preferred to have time between trials (a few days at least) to relax from the ardour of a completed trial, and to give themselves the opportunity to prepare for the next trial to ensure they committed no embarrassing tactical errors that could be spotted by their instructing solicitor.

Secondly, as former solicitors, Melbourne and Sydney barristers recognise the havoc that a returned brief can cause. To find a replacement, the solicitor will probably need to venture outside the small group of barristers that the solicitor

about the practice, but that double-booking could be a disciplinary offence: Interview with Steve Mark, Commissioner, Office of the Legal Services Commissioner (Sydney, 2 May 2007).

<sup>108</sup> In Victoria, a barrister might also be assessed costs if the return of a brief within seven days of trial is adjudged unreasonable: *Crimes (Criminal Trials) Act 1999* (Vic) s 27(3)(b). Barristers in Melbourne could recall only one instance when costs had been assessed, and no-one knew the amount. (On that occasion, a barrister's late return of a brief had forced a murder prosecution in the Supreme Court to be adjourned for a replacement barrister to prepare.) It is unclear whether this sanction's rarity means that barristers do not return briefs or that the sanction is largely toothless.

<sup>109</sup> The listing system provides a fourth impediment to double-booking. In Sydney, trials in the District Court are often scheduled no more than two or three months from the listing hearing, itself a proceeding that occurs shortly after the committal in the Local Court. As Legal Aid NSW does not choose a barrister until the trial date is set, no barrister could double-book two of its cases. In Melbourne, double-booking is minimised because the trial date is selected with the barrister's diary in mind since barristers are expected to keep the case from committal to its termination. In both jurisdictions, of course, a barrister could double-book by mixing briefs from legal aid with briefs from private solicitors funded by legal aid or by defendants themselves.

<sup>110</sup> I have been told by barristers in London that the clerks of most chambers are now salaried.

routinely uses.<sup>111</sup> This is because those barristers will be occupied with the solicitor's other briefs or with those of some other solicitor, since the same features that attract the first solicitor to those barristers make them attractive to other solicitors. Moreover, the replacement barrister, even if previously employed by the solicitor in earlier cases, may lack the special skills that drew the solicitor to the first barrister.<sup>112</sup>

The solicitor is not compensated by either legal aid or a paying client for finding a replacement barrister. The first barrister's departure could also imperil the solicitor's relationship with the defendant. Solicitors recognise that defendants often envision the prosecution as a juggernaut bent on their destruction. Defendants manage their anxiety through the belief that their legal representatives are skilled and reliable. The barrister's departure, then, can erase the defendant's confidence in the solicitor's assurances that the latter is managing the defence and has chosen in the barrister an effective shield to protect the defendant. The solicitor may struggle to alleviate the defendant's dismay at the first barrister's disappearance and to allay suspicions about the talents of the substitute. Barristers, as former solicitors, recognise that returning a brief can be a disaster for the solicitor's relationship with the defendant. Not surprisingly, then, barristers were astonished when told that as many as 50 per cent of defence briefs were returned by their counterparts in England's Crown Court.

It is also not surprising that most of the solicitors interviewed would not tolerate returned briefs. Their intolerance explains the third reason why barristers say that they do not return briefs: barristers fear losing the solicitor as a source of briefs. As many barristers receive most of their briefs from very few solicitors, to rile one and lose that business would border on financial suicide.<sup>113</sup>

Most of the solicitors interviewed were harsh disciplinarians, in effect applying strict liability. With a business to run, their view was that no barrister is indispensable. Nor did the barrister's explanation matter to them; barristers must arrange their calendars to make court appearances. Only one solicitor, while soured by returned briefs, was more understanding. He accepted that trials exceed their estimated lengths, spilling into the period set for his client's trial, and that barristers might return his brief to accept another solicitor's more lucrative one. Despite his tolerance, however, this solicitor demanded an explanation from the barrister. Moreover, he would drop a barrister who failed to notify him at least two weeks before a court date if the barrister was worried that they might not be able to meet that date. This was done so that the solicitor had time to decide whether to find a replacement.<sup>114</sup>

<sup>111</sup> Solicitors have told me that they try to maintain a small retinue of barristers they trust, and whom they thus brief repeatedly. One busy solicitor in Sydney had more than most in his group: four Senior Counsel, six senior juniors, and 12 or more juniors.

<sup>112</sup> The skill may be almost laughably specific. One solicitor thought a barrister excelled in defending commercial drug charges, but would not brief him in other matters despite his skill in dissecting financial statements or cross-examining a victim subtly or an accomplice aggressively.

<sup>113</sup> Several barristers said that as few as two or three solicitors provided the bulk of their work.

<sup>114</sup> The barristers interviewed said that they themselves notified the solicitor if they had to return a brief. They wanted to apologise and to explain their reasons. Clerks said that when a barrister told them to inform the solicitor, they urged the barrister to do so as well.

Solicitors in VLA were no less insistent that barristers avoid inconveniencing them by returning briefs. While keeping no formal record of barristers who had returned briefs, they knew the culprits and tried to avoid briefing those who had. Their counterparts in Sydney had an even more effective way of minimising the number of briefs returned. The authority to select barristers was consolidated in two solicitors, one for the District Court and the other for the Supreme Court.<sup>115</sup> While not regarding the return of a single brief as a capital offence, they also knew the culprits and chose them only in circumstances where those barristers could not return their briefs.<sup>116</sup>

The conclusion, then, might be as follows. For most solicitors in Melbourne and Sydney, the returned brief is anathema. Double-booking by itself, however, is not.<sup>117</sup> Solicitors understand that when a barrister accepts their brief for a trial listed months in the future, the barrister may not reject the offer of other briefs whose trials might overlap with the solicitor's trial. In independent practice (where there is an inability to rely upon other fee-earners), a barrister's financial security can be precarious, made more so by the uncertain fate of cases. Cases bound for trial, with their higher fees, may be unexpectedly washed away before the trial date by guilty pleas, dismissals or even postponements. To ensure that they have work, then, barristers may double-book. Solicitors can tolerate double-booking, but only if barristers notify them far enough in advance of the scheduled proceeding for them to obtain a suitable replacement.<sup>118</sup> They do not forgive being told shortly before the trial date that the barrister is 'jammed'<sup>119</sup> and must return the brief.

This conclusion applies to overlapping trials of any length, and also illuminates two versions of the Monday-Wednesday setting. Suppose that a barrister has Monday's brief for a two-day trial when offered Wednesday's. Monday's is funded by legal aid; Wednesday's is funded by the defendant and pays much more. The barrister wants to crack Monday's trial in order to keep Wednesday's. Barristers in Melbourne would have difficulty achieving this end with impunity. Monday's solicitor could be perplexed by, and thus suspicious of, the barrister's last-minute recommendation of a guilty plea. This suspicion stems from the barrister's lengthy relationship with the case, from the committal to the trial.<sup>120</sup>

<sup>115</sup> In Victoria, each VLA solicitor chooses the barrister for their cases.

<sup>116</sup> The listing system in Sydney's District Court has become so efficient that cases are scheduled for trial as short as two weeks in the future. It is only with cases such as these (which are to begin imminently) that these two solicitors would risk instructing a barrister who had previously returned their briefs, and then only if the barrister had no briefs from private solicitors that might conflict with theirs.

<sup>117</sup> Nonetheless, the threat that double-booking would produce flicked briefs led one solicitor to stop asking a clerk for the names of available barristers upon discovering that the clerk was double-booking one of those he named. Conversely, a clerk said he stopped telling solicitors that a particular barrister was available when he learned that the barrister was himself double-booking and not telling the clerk the details of his schedule.

<sup>118</sup> With two weeks notice, one solicitor found a replacement to defend in a murder case in enough time for the second barrister to prepare adequately. A week before a trial was the shortest time any barrister in Melbourne admitted to having returned a brief.

<sup>119</sup> 'Jammed' is the colloquial expression used in both Australian jurisdictions to describe the barrister's conflicting obligations that require them to flick a brief.

<sup>120</sup> Barristers in Sydney could more easily disguise their self-interest in recommending a last-minute guilty plea because they are briefed after the case reaches the District Court and thus have less

If, however, the barrister was renewing a recommendation made in an earlier conference to plead guilty, the solicitor could accept this last-minute renewal of that recommendation.<sup>121</sup> However, if the barrister had never tried to persuade the defendant to plead guilty, the solicitor would want to learn why the barrister's position had reversed.<sup>122</sup> What is it about the Crown's evidence, or the defendant's, that prompted the shift? If a guilty plea is the wiser choice, why did the barrister not urge that plea earlier when the defendant had not lost most of the sentencing discount?<sup>123</sup> As a result, several solicitors were flabbergasted that a barrister, despite holding their brief for Monday, would accept Wednesday's brief given that they would punish the barrister by denying them other briefs if the barrister returned theirs or goaded their defendant to plead guilty.<sup>124</sup> Moreover, solicitors share their views about barristers with each other, and the barrister must worry, then, that their reputation will be tarnished.

Now change the order of the briefs. The barrister holds Wednesday's brief when offered Monday's. Do they accept? Before doing so, the judicious barrister would telephone Wednesday's solicitor to explain this new opportunity. If Wednesday's solicitor was assured that Monday's defendant would plead guilty, then the solicitor might acquiesce. However, Wednesday's solicitor's apprehension that Monday's defendant wanted a trial would turn into displeasure if that brief were returned when Monday's trial did not end as predicted.

In this second version, an inexperienced barrister has an additional reason to decline Monday's brief. When Wednesday's case is tried, the barrister will be

connection with the case and the defendant than do barristers in Melbourne. Barristers with a returned brief in England's Crown Court have the easiest time disguising their self-interest. While the barrister could honestly disagree with other advocates' judgement about the better plea, there is no check on the barrister if they lie by saying a guilty plea would produce a better outcome than a trial. The solicitor in the Crown Court does not attend the barrister's conference with the defendant. Instead, the solicitor sends a representative who often has no legal training and thus no stature to oppose the barrister's recommendation of a guilty plea: see Tague, 'Guilty Pleas and Barristers' Incentives', above n 5, 291. In Victoria, by contrast, VLA pays solicitors to attend conferences with the defendant and barrister, and expects at least an associate to do so. One barrister in Sydney said he would solve the Monday-Wednesday quandary by trying Monday's case, but by presenting the defence in a way that ensured the trial ended in two days (by, for example, hammering at one problem with the Crown's evidence and ignoring the other two the defendant wanted raised).

<sup>121</sup> The defendant, but not the solicitor, might distrust the barrister's loyalty if the barrister questioned the plausibility of the defendant's instructions. Solicitors said that they usually probed the defendant's story closely and expected the barrister to do the same. If a defendant expressed surprise at being challenged, one solicitor said he told the defendant that: 'You're not paying me to tell you the good bits. You need to be told where your response to the Crown's evidence is weak.'

<sup>122</sup> In a similar setting, a VLA solicitor sacked a barrister, the only time this was done by any of the solicitors interviewed. The barrister, himself a replacement, was instructed to try the case. Unable to be with the defendant at the trial's beginning, the VLA solicitor was shocked when she visited this defendant's courtroom to observe that he was in the process of pleading guilty. Learning that the barrister had persuaded the defendant to change his plea, the solicitor fired the barrister. The judge rescheduled the case to let the solicitor replace the replacement.

<sup>123</sup> The advice to plead guilty would be viewed differently had the barrister counselled the defendant to delay entering such a plea in hope negotiations conducted near the trial might produce a better result: see above nn 86-90 and accompanying text.

<sup>124</sup> To escape the burden of finding a barrister to replace the one threatening to return Monday's brief, solicitors conceded that they might not oppose letting the barrister persuade Monday's defendant to plead guilty. While the barrister would be punished in the future, this defendant suffers by pleading guilty when ignorant of the tension between their barrister and solicitor.

accompanied to court by the instructing solicitor. The solicitor will provide assistance by keeping notes and reminding the barrister of points to make, but will also judge their skill and sangfroid in presenting the defence. The new barrister's goal is not simply to avoid embarrassment but also to impress the solicitor with their acumen. It may be wiser to use Monday and Tuesday to prepare Wednesday's trial than to skimp on preparation because occupied with defending Monday's defendant.

Barristers in Melbourne and Sydney therefore have persuasive reasons to resist the twin temptations to return briefs or to pressure reluctant defendants to plead guilty in order to avoid returning their briefs, because both actions can attract sanctions by solicitors.

Having considered whether barristers recommend guilty pleas over trials to their clients' detriment, one last question remains: would barristers' preference for trials lead them to commit the inverse wrong? That is, would they avoid candidly advising the defendant that a guilty plea would be the wiser choice in order to pocket a trial fee even if the trial predictably ends in a worse result for the defendant?

#### V TRIALS WHEN GUILTY PLEAS ARE APPROPRIATE

Whether the defence is funded by the defendant or by legal aid, barristers receive higher fees for trials than guilty pleas. It follows that when barristers recommend a guilty plea their motive is ordinarily not to reap financial gain.<sup>125</sup> However, the barrister's preference for trials invites consideration of the opposite problem than the one that has concerned us so far. By earning more for a trial, might barristers fail to warn optimistic or obtuse defendants that the wiser choice is to plead guilty?<sup>126</sup>

As with the central issue discussed in this article — whether barristers selfishly extract guilty pleas from defendants without regard to the defendant's interest — barristers deny withholding advice in order to lure a defendant into a trial even when there exists the likelihood that the result will be worse than that expected from a guilty plea. Indeed, the interviewees ridiculed any barrister who withheld advice over the comparative advantage of a guilty plea to obtain the higher fee for a trial. In their view, only a barrister whose practice was floundering, if not failing, would engage in such a strategy.

Here we must consider, however, the curious responses of barristers in Melbourne to a different study about plea negotiations. Of those interviewed, 54 per cent said they 'engaged in plea bargaining in fewer than 50 per cent of their cases',<sup>127</sup> with negotiations occurring in no more than 42 per cent of cases in the County Court.<sup>128</sup> Does this suggest that defence barristers do not plea bargain in

<sup>125</sup> The exception occurs, as with the Monday-Wednesday illustration, when barristers fear they must return a high-paying brief unless another defendant pleads guilty.

<sup>126</sup> To illustrate that they did not follow such a strategy, many interviewees offered instances when they were proud of having negotiated a beneficial outcome for a defendant even as they lost money by doing so.

<sup>127</sup> Seifman and Freiberg, above n 7, 68.

<sup>128</sup> *Ibid* 69 fn 27. Plea negotiations occurred less frequently in the Supreme Court (in 32 per cent of the cases).

every case? This intriguing data begs for an explanation,<sup>129</sup> although none was offered by the authors of the study.

One explanation might be the one under consideration: defence barristers refrained from negotiating because, benefiting more from trials than guilty pleas, they did not want defendants to plead guilty. Other explanations are also plausible and are consistent instead with loyal rather than self-interested representation.

For one, prosecutors may have refused to negotiate — they may have been confident of proving the charges, or preferred to have a jury decide the merits of an uncertain charge rather than dropping that charge in order to end the case more efficiently (with, for example, guilty pleas to the remaining or alternative charges). Conversely, the defence barrister may not have initiated negotiations because they were certain that the prosecutor would not accept the outcome desired by the defendant.

Perhaps defendants may have pleaded guilty to all the charges, trusting that the discount would provide a benefit that negotiations would not.<sup>130</sup> This third explanation seems unlikely in light of barristers' doubts about the value of the purported discount, a discount that could also have shrunk by at least 60 per cent (from 25 to 30 per cent to no more than 10 per cent) if the defendant waited until the trial to enter that plea.<sup>131</sup>

Two other explanations are more plausible. One involves the barrister's relationship with the defendant and the instructing solicitor; the other involves a comparison between the expected values of a trial and a negotiated guilty plea. With the established model that barristers take instructions from defendants, the barrister bows to the defendant's desire for a trial even if that choice seems foolish. Solicitors tend to reinforce this model, at least with defendants who pay fees, by insisting that the barrister carry out the defendant's decision over any plea previously chosen in consultation with the solicitor. This model incorporates the barrister's formal relationship with the solicitor and the defendant: the solicitor is the barrister's client, and the defendant is the barrister's 'lay' client. It also underscores that the barrister is not responsible for preparing the case, but rather executes a defence provided by the solicitor in the brief.

<sup>129</sup> This reflects my attitude as a former criminal defence lawyer in the US, one leery of going to trial in light of the prosecution's practices of overcharging and of the frequent chasm between the sentences for a guilty plea and for a trial conviction. If the case mentioned in above n 2 seems extreme, the US Supreme Court approved of a similar plea bargain in *Bordenkircher v Hayes*, 434 US 357 (1978) by holding that it was not unconstitutional to recharge a defendant as a habitual offender (based on two theft charges) when he refused to plead guilty and accept a prison term of five years for forging an \$88 cheque. The defendant was convicted at trial and sentenced to life imprisonment.

<sup>130</sup> The data is not sufficiently refined to identify the charges to which defendants plead guilty. In England's Crown Court, for example, of those cracked trials ended by a guilty plea, the statistics include only two categories — a guilty plea to at least one of the original charges or a guilty plea to an 'alternative' (a new) charge: Dibdin, above n 19. I could not find such data for Victoria and NSW.

<sup>131</sup> On the other hand, one solicitor noted that judges count contrition or, conversely (and heretically), they punish defendants who do not plead guilty.

Thus, even though authorised unilaterally to offer 'strong' advice to the defendant about the plea, barristers may hesitate to do so.<sup>132</sup> If the defendant wants a trial, or has been persuaded to deny guilt by a solicitor who is not hoodwinking the defendant to achieve selfish financial ends, the barrister does not reveal doubts about a trial's value, or shares them only with the solicitor. More trials could be expected if barristers were to follow this deferential model of their role than if they tried to persuade the defendant to accept what they regard as the wiser plea, that of admitting guilt.

If barristers doubt the wisdom of pleading not guilty, they can assuage their concern by comparing the expected value of a trial with that of a guilty plea. The barrister knows that the defendant has let slip the propitious time to plead guilty in the Magistrates' or Local Court or soon after the case was transferred to the County or District Court.<sup>133</sup> If at those stages the defendant rejected the barrister's and the solicitor's forthright advice to plead guilty, the barrister may see no reason to revisit the issue in the hope that the defendant will reconsider this unwise choice.<sup>134</sup>

Thus, with the discount largely lost, whatever value remains in the entry of a guilty plea near the date of trial becomes more problematic given the uncertainty over the identity of the sentencing judge. Barristers typically learn the judge's identity no earlier than the day before the trial's scheduled inception.<sup>135</sup> If that judge sentences harshly, the value of a guilty plea plummets; a trial at least preserves the chance of an acquittal. Even if the judge is known to sentence leniently, there is no guarantee the judge will select the sentence. Unless the judge agrees that the case be 'part-heard',<sup>136</sup> the case will be returned and reassigned to a judge available on the date of sentence. What if the new judge is more punitive?

Data on sentencing outcomes in NSW also reinforce a barrister's doubt about the value of guilty pleas. The imprisonment rate for certain serious offences

<sup>132</sup> Deferring to the defendant (and solicitor) is arguably inconsistent with the barrister's duty to advise the defendant generally as to the plea and, if necessary, to express a view 'in strong terms': Bar Standards Board, *Code of Conduct* (8<sup>th</sup> ed, 2004) s 3 [11.3]. Similarly, the barrister in Victoria is 'entitled to ... advise a client in strong terms that the client is unlikely to escape conviction': The Victorian Bar Inc, *Practice Rules* (2005) r 151.

<sup>133</sup> Under the pilot project in Sydney, the barrister expects the solicitor to discuss a guilty plea with the defendant when the case begins in the Local Court. In Melbourne, the barrister would have spoken with the defendant himself about a guilty plea after the committal.

<sup>134</sup> In England, the barrister's considerations may be different because barristers believe certain solicitors are excessively optimistic about the outcome of a trial either not to upset the defendant or to maintain a reputation of fighting the police and prosecution aggressively. Solicitors motivated by the first reason expect the barrister to douse the defendant's unrealistic expectations of an acquittal. Even where solicitors are motivated by the second reason, a barrister entering the case late should arguably offer candid advice about the choice of plea nevertheless. Barristers in Melbourne and Sydney did not indicate that solicitors in either city acted in those two ways.

<sup>135</sup> One barrister in Melbourne observed that it was 'taboo' to try to learn the judge's identity before the name was released by the listing office. Due to uncertainty over the judge's identity, one Queen's Counsel in Sydney said he never notified the prosecution of the defendant's intent to plead guilty until he learned who would be the sentencing judge taking the plea if the case were not tried.

<sup>136</sup> 'Part-heard' is a term I use in this context that generally means the judge has more to do with the case. Because much of the information germane to the sentence's selection is gathered after the guilty plea, judges, I was told, usually do not keep the case for sentencing unless somehow invested in its selection (by having heard a witness, for example).

(sexual and non-sexual assault) is similar regardless of the plea, and for other offences, such as receiving stolen property and larceny, the imprisonment rate is lower for jury convictions than for guilty pleas.<sup>137</sup>

However, even if convicted, defendants may be pleased by having a trial as they do not recognise its cost. Some regard a guilty plea as a cowardly capitulation; others are satisfied that their accusers were rigorously cross-examined, their stories debunked in public. Nor will defendants berate themselves for choosing a trial so long as they do not learn what the sentence would have been for a guilty plea. Judges do not reveal the amount they would have subtracted from the sentence imposed had the defendant pleaded guilty.<sup>138</sup>

Moreover, barristers can rationalise having a trial even if, as a juror, they would themselves convict the defendant. A trial preserves the opportunity for the jury to err. Barristers know that juries acquit when such an outcome seems incredulous. They also know that something unexpected can occur that tips even a credulous jury to acquit.<sup>139</sup> Most interestingly, airing the evidence at trial could be the most effective way to mitigate the defendant's culpability. The judge obtains a richer understanding of the controversy, one that could favour the defendant more than could a description of the defendant's behaviour presented to the judge by the parties as part of a plea agreement.<sup>140</sup>

Also, asymmetries in trial procedure marginally increase the likelihood of acquittals. The defence knows the Crown's evidence, even the order in which it will be presented,<sup>141</sup> while able to hide most of its own evidence.<sup>142</sup> Armed with this information, the defence barrister is in a position to tear wide any rent in the Crown's fabric of guilt. Moreover, because the prosecution must call every witness with relevant information, the defence can employ the sword of cross-examination but the prosecutor cannot. Then, each side addresses the jury only once, with the defence barrister speaking second. The Crown Prosecutor

<sup>137</sup> See generally Judicial Commission of New South Wales, *Judicial Information Research System (JIRS)* (22 April 2008) <<http://www.judcom.nsw.gov.au/sentencing/jirs.php>>. One must be careful of such data, however, because it does not include whether defendants convicted by juries were incarcerated for longer periods of time. In England, the parole system also makes a trial less hazardous. With defendants automatically released after serving half the sentence, a defendant might risk a trial because the effective time served in prison is not substantially greater if convicted at trial than by guilty plea: see Tague, 'Tactical Reasons for Recommending Trials Rather than Guilty Pleas in Crown Court', above n 92, 31–6.

<sup>138</sup> By contrast, if the Victorian Sentencing Advisory Council's recommendation is adopted, defendants will be told the sentence that would have been imposed had they not pleaded guilty: see Sentencing Advisory Council, *Final Report*, above n 7, 55.

<sup>139</sup> Witnesses disappear, for example, or their testimony is less convincing than expected, or a juror may persuade the other jurors about a fault in the Crown's case overlooked by the defence barrister (perhaps because it did not exist).

<sup>140</sup> The defendant's behaviour might appear less troubling when described by the witnesses in their testimony than in their statements to the police, or the accusing witnesses appear no less culpable than the defendant.

<sup>141</sup> A Crown Prosecutor in Melbourne said he and his colleagues shared this information with the defence.

<sup>142</sup> If the case was to be tried, a solicitor in Melbourne thought he was not alone in refusing to provide any information about the defence during the case conferences in the County Court. Moreover, solicitors in Melbourne said that they were deliberately vague in explaining why they wanted to cross-examine certain people in trying to persuade magistrates to force them to testify during contested committals.



therefore has no way to rebut the defence barrister's attack on the evidence of guilt.

A third general reason for preferring trials is the attitude of Crown Prosecutors. Not serving at the pleasure of the Director of Public Prosecutions, they do not rabidly seek convictions in part because they will not personally suffer if their conviction rate is low.<sup>143</sup> They tolerate acquittals because they are expected to prosecute fairly. This view of their role obliges them to be less aggressive than, say, their American counterparts.<sup>144</sup>

In summary, it may appear puzzling as to why trials occur that objectively seem destined to end in conviction on all charges. Was the defendant not persuaded to plead guilty because their barrister wanted to reap the benefit of the higher fee for a trial? While that interpretation is possible, there are other, more persuasive reasons for the trial. The barrister's relationship with the defendant led them not to pressure the defendant to plead guilty, and the barrister can defend having a trial because its expected cost does not obviously exceed its expected value.

## VI CONCLUSION

A defendant who wishes to contest a criminal charge will often feel enormous pressure to plead guilty from the prospect of a sentencing discount, from the prosecution's willingness to accept a plea to fewer than all the charges (or to alternative charges), and from the defence barrister's recommendation to plead guilty.<sup>145</sup> In the first two instances, the defendant's difficulties lie in identifying and comparing the expected benefits and costs of each, and in the need typically to rely on the defence barrister's assessment. No matter whether they understand or reject that assessment, what defendants will not perceive (although the solicitor might) is the barrister's insidious and disguised pursuit of self-interest, which might otherwise appear to the defendant to be a loyal evaluation of what is in the defendant's best interests.

Such a pursuit exemplifies the principal-agent problem. How do we align the agent's (the barrister's, solicitor's and attorney's) interests with the principal's (the defendant's), so that the former provides the effort that the latter expects and deserves? We could trust barristers to inculcate the principle of faithful work, and thus to subjugate their interests to those of defendants. The absence of any complaint in Melbourne and Sydney that barristers seek their interests at the defendant's expense in advising over the choice of plea is reassuring evidence that barristers in those two cities are faithful agents. However, accusations of self-dealing by barristers in England's Crown Court and by attorneys in the US

<sup>143</sup> Interviews with several Crown Prosecutors (Melbourne and Sydney, April and May 2007).

<sup>144</sup> As an example, Crown Prosecutors in Australia said that they would tell the jury in their closing addresses to ignore a particular witness who had testified for the prosecution if they thought that witness testimony was not credible.

<sup>145</sup> The solicitor might also recommend a guilty plea, but I have focused on the barrister by assuming that many solicitors will ultimately defer to the barrister's evaluation of the better choice for the defendant.

confirm the wisdom of ensuring that the structure of practice creates incentives for barristers in the two Australian cities to act as they claim to do.

That structure already exists in Melbourne and Sydney. Barristers prefer trials because the remuneration in both publicly- and privately-funded cases exceeds that for guilty pleas. Barristers also risk the ultimate sanction of being denied briefs if their instructing solicitor suspects that they do not honestly believe a guilty plea is the wiser choice for the defendant and are instead seeking their ends at the defendant's expense through such a recommendation.

Moreover, the aspects of practice that create opportunities for self-dealing by barristers in England do not exist in either Australian city. In particular, Australian barristers do not rely on their clerks for work, most do not double-book and few return briefs. Moreover, in Melbourne, the barrister's early involvement in the defence — representing the defendant during a contested committal — makes it much more difficult to hide self-interest were the barrister to shift their recommendation from trial to guilty plea very close to the date of trial.

It seems safe to conclude that when barristers in Melbourne or Sydney do recommend that the defendant change their plea near the trial date from 'not guilty' to 'guilty', they do so by judging such a plea to be in the defendant's best interests. This is so because a guilty plea will usually harm rather than advance a barrister's selfish interests. This conclusion removes a potentially fatal flaw in negotiated guilty pleas, because if the barrister cannot be trusted to represent the defendant's interests, the defendant who pleads guilty as a result of the barrister's advice cannot be said to have done so intelligently.